91-191

Supreme Court, U.S.
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Docket #

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SUSAN MURPHY & MARY MURPHY
PETITIONERS

VS.

I.S.K. CON. OF NEW ENGLAND, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES

1. Does the free exercise clause of the First Amendment, applied to the States by the Fourteenth Amendment, exempt religious organizations from generally applicable tort liability for intentional infliction of emotional distress for actions committed in the course of conduct claimed to be religiously motivated?

2. Does a religious organization forfeit any First Amendment protections it might have from generally applicable tort liability for religiously motivated conduct when it admits a child to its religious community without her parents' consent?

3. Was the court below correct in extending the holding in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (requiring independent review of record by appellate court in determinations of malice in public figure

defamation cases) to a First Amendment defense made in an action brought against a religious organization by a mother and her minor daughter for the torts of (a) intentional interference with parental rights, (b) intentional infliction of emotional distress, and (c) breach of a voluntarily assumed duty to care for the daughter?

4. Are repeated and emphatic instructions to the jury that the defendant has a constitutional right to believe as it sees fit and that liability cannot be based upon religious belief sufficient to protect the First and Fourteenth Amendment rights of a religious organization when its religious texts, which it taught to a 15 & 16 year old child during her admission to its religious community without her parents' consent, are read to a jury in a tort case in which the teachings contained in those

texts: (1) were an integral part of the torts committed by the organization (2) were a part of the coercive persuasion ("brainwashing") practiced upon the child by the religious organization; (3) help to explain why the child acted in the way that she did; (4) support the child's and the mother's assertions that members of the religious community acted in certain ways; and (5) were a substantial factor in causing psychological injury to the child.

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B. THERE IS A SUBSTANTIAL QUESTION WHETHER THIS CASE IS GOVERNED BY THE STANDARDS RECENTLY SET OUT IN EMPLOYMENT DIV., DEPT OF HUMAN RES. V. SMITH, Docket # 88-1213, UPHOLDING NEUTRAL LAWS WHICH MAY IMPINGE UPON FREE EXERCISE OF RELIGION OR BY THE COMPELLING GOVERNMENTAL INTEREST TEST SET OUT IN SHERBERT V. VERNER, 374 U.S. 398 (1963)

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Murphy vs. I.S.K. Con. of New England, Inc., 409 Mass. 842 (1991)

GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Review of a decision of the Supreme Judicial Court of Massachusetts dated May 1, 1991. The statute conferring jurisdiction on the United States Supreme Court is 28 USC Section 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

The only federal constitutional provision, treaty, statute, ordinance or regulation involved in this case is the First Amendment to the United States Constitution which provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

The First Amendment has been applied to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The following Massachusetts statues are involved in this action and are set out in the Appendix at pp 61-63:

-- G.L. c. 272 Section 1 (imposing criminal penalties for enticing a person under the age of 16 away from home for marriage);

-- G.L. c. 272 Section 2 (imposing criminal penalties for enticing a person away from home for purposes of sexual intercourse);

-- G.L. c. 272 Section 6 (imposing criminal penalties upon anyone who "being the owner of a place or having or assisting in the management or control thereof, induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse");

-- G.L. c. 265 Section 22 (imposing criminal penalties for rape);

-- G.L. c. 265 Sections 22A and 23 (imposing criminal penalties for statutory rape, i.e., sexual intercourse with a child under sixteen years of age); and

-- G.L. c. 266 Section 34 (imposing criminal penalties for inducing another to part with property under false pretenses).

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

This is a tort action brought by Mary Murphy and her minor daughter, Susan Murphy, arising out of Susan's admission, without Mary's consent[1], to the defendant's religious community, during the course of which Susan was subjected to coercive persuasion ("brainwashing") and various torts were committed upon Mary and Susan.

Four causes of action were presented to the jury: (1) Susan's claim for damages for intentional infliction of emotional distress;[2] (2) Susan's claim for breach of duty to provide adequately for her

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[1] Mary Murphy was divorced and had custody of Susan.

[2] Agis v. Howard Johnson Co., 371 Mass. 140, 144-145, 355 N.E.2d 315, 318 & 319 (1976) (liability imposed for extreme emotional distress intentionally inflicted through extreme and outrageous conduct beyond all possible bounds of decency and utterly intolerable in a civilized community).

welfare while she was under the defendant's care, including breach of a duty to take reasonable steps to prevent her from being assaulted by a member of the defendant's religious community;[3] (3) Mary's claim for intentional infliction of emotional distress; and (4) Mary's claim for intentional interference with her parental custody rights.[4] TR 4171 - 4191.

The case was tried to a jury for six weeks in the Superior Court of Massachusetts. The trial judge, repeatedly and emphatically throughout the trial and during his charge, instructed the jury in the meaning of the First Amendment and hat liability could not be premised on the

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[3] In Massachusetts tort damages will be awarded against a person who voluntarily assumes a duty and then fails to fulfill that duty. See e.g., Mullins v. Pine Manor College, 389 Mass. 47, 54, 449 N.E.2d 331 (1983).

[4] Massachusetts recognizes a tort for intentional interference with parental rights. 409 Mass. 859 et seq. Appendix p. 43 et seq.

defendant's religious beliefs. See Appendix pp 64 et seq.

The jury was charged on the defendant's contention that Susan and Mary had consented to the defendant's conduct and their assertion that any consent on their part had been obtained by fraud. TR 415 & 4176, 4229 - 4230. The jury's award indicates that it found for the plaintiffs on these issues.

The trial court, to avoid any potential double recovery, instructed the jury that if it found for either of the plaintiffs on both counts that it should separate out from its findings of damages on the second and fourth counts all damages for emotional distress and include those damages in the counts for intentional infliction of emotional distress. In framing special questions the trial court asked the jury to separate out the assault and battery component

resulting from the force used by Susan's Krishna husband to compel her to have sexual intercourse with him from any damages awarded under the count for breach of an assumed duty of care to provide adequately for her welfare. TR 4191, 4198.

The jury awarded Susan $210,000 for intentional infliction of emotional distress and $30,000 for defendant's failure to provide for her welfare, $10,000 of which was attributable to the defendant's failure to protect her from assault and battery by her Krishna husband. Mary Murphy was awarded $350,000 for intentional infliction of emotional distress and $20,000 for intentional interference with her parental rights. Defendant's motions for a new trial and for judgment notwithstanding the verdict were denied. Defendant appealed.[5]

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[5] Plaintiffs cross-appealed, challenging various rulings by the trial judge. Those issues were decided against

While the Defendant presented the issue of its religion squarely before the jury in its opening statement[6], and failed on occasion to make timely objections to evidence concerning its religious beliefs and practices[7], defendant, before, during and after trial, claimed the First Amendment privilege, and, at trial, frequently objected to the admission of evidence concerning its religious beliefs, teachings and practices.[8]

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the Plaintiffs on state law grounds and Plaintiffs do not bring them before this Court.

[6] Plaintiffs made hardly any reference to the religious beliefs of the defendant in their opening. TR 536 - 588. No objection was made by the defendant. Defendant went into the issue of religious belief extensively. TR 593 - 612. Those portions of the openings relating in any manner to religion or religious teachings are set out in the Appendix at pp

[7] See e.g. TR 656 - 661.

[8] In the Supreme Judicial Court the Plaintiffs asserted that the Defendant had waived its First Amendment claims by failing to make proper objections to jury instructions. That assertion was rejected

The appeal was heard by the Supreme Judicial Court (hereinafter "SJC"), the court of last resort in Massachusetts. The SJC, considering the case exclusively on First Amendment grounds,[9] reversed and remanded.

Plaintiffs can deduce four grounds for the SJC's reversal of the jury verdict, each ground constituting error and each meriting review by this Court.

First, extending the holding in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) to cases raising

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by the Supreme Judicial Court at footnote 12. Because Plaintiffs view that matter as one of state procedure, they will not press that claim here.

[9] The SJC stated at note 7 that, "Although the defendant cites art. 2 of the Massachusetts Declaration of Rights, the arguments in its brief to this court are based on a discussion of the rights of free exercise granted under the First Amendment to the United States Constitution. Accordingly, we shall confine our consideration of the defendant's claims to the context of the First Amendment."

issues under the free exercise clause of the First Amendment, the SJC engaged in an independent examination of the entire record to ensure that "the judgment does not constitute a forbidden intrusion into the field of free expression." 409 Mass. at 849. Appendix p. 19. In its independent review of the record, the SJC ignored numerous possible constitutionally permissible bases for the jury's verdict. See discussion at Section III., infra.

Second, the SJC rejected plaintiffs' contentions that defendant's actions in admitting a minor to a religious community without her mother's consent and subjecting her to coercive persuasion ("brainwashing") vitiated defendant's First Amendment rights and made its actions subject to regulation by the State as if it were any other organization. While admitting that "Susan's minority is of constitutional significance," the SJC

held that "we are not persuaded that [Susan's] age alleviates the free exercise concerns raised by the jury's evaluation of the defendant's religious beliefs." 409 Mass. at 856. Appendix p. 36.

Third, the SJC held that the act of teaching a religious doctrine cannot be a part of a claim for damages. 409 Mass. at 852 - 856. Appendix pp. 26 - 37.

Fourth, the SJC held that the tort of intentional infliction of emotional distress cannot be imposed for protected religious speech. 409 Mass. 858 & 859. Appendix 40 - 43.

Based on the above, the SJC ordered entry of a directed verdict for the defendant on the intentional infliction of emotional distress claims and remanded for a new trial stating that:

> ... On retrial, damages alleged by Susan and Mary based on allegations of intentional infliction of emotional distress may be considered to the extent that such damages are an element of the claims

of physical and sexual abuse of Susan. Mary's claim of intentional interference with parental rights ... also may be considered on retrial."

... We are constrained from answering definitively the defendant's arguments regarding the claims of breach of a duty of care and vicarious liability due to the difficulty in separating out consideration of the defendant's constitutionally protected religious beliefs from conditionally protected religious activity and from conduct outside the scope of constitutional scrutiny.[10] 409 Mass. at 859. Appendix 42 & 43.

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[10] The SJC in a footnote inserted at this point stated that: "We note that the essence of the assault and battery claim is conduct by Doug Hewer, not religiously motivated and not entitled to constitutional protection." Decision at note 14.

2. FACTS ADMITTED INTO EVIDENCE WHICH ARE MATERIAL TO THE QUESTIONS PRESENTED[11]

When Susan Murphy was age 13 & 14 (before the defendant corporation was formed) adult members of the Hare Krishna temple in Boston convinced her to run away from home so that she could practice the Hare Krishna religion without interference from her mother. They helped her to run away, harbored her after she left home, and married her to a Hare Krishna devotee 19 or 20 years old. For approximately two years Susan and her Krishna Husband stayed, at times, in various Hare Krishna temples in the U.S. and Canada, returning

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[11] The facts set out below include those facts which the jury could have found from the evidence favorable to the Plaintiffs. An asterisk indicates testimony of a defense witness.

only for short stays in the Boston area.[12]

During this period, Susan's mother, Mary, was unable to exercise parental control over Susan.[13] Each time Mary would attempt to exert control over Susan, she and her "Krishna Husband" would disappear, often into some Hare Krishna temple.

In 1974, when Susan was 15 years old

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[12] TR 616 - 764; specifically: 648 - 657, 677 - 682, 690 - 707, 718 - 764, 1160 - 1161, 1416 - 1421, 1442 - 1447, 1734 - 1736 2102*, 2124*, 2125*, 2430, 2431, 2497 - 2506, 2739 - 2740*, 3702, 3703, 3812 - 3826.

[13] Mary did everything that she could think of to find Susan. She called Susan's friends, her priest, the police, the FBI but they were not able to help her. TR 1437 - 1439, 1736, 3813. She went to the Boston Hare Krishna temple with a friend but the people she met at the temple denied knowing Susan. TR 1424 - 1425, 1432 - 1436. Mary encouraged Susan's older sister Eileen to go to the temple to see if she could learn something about Susan. Eileen spoke with Sumati, a woman of about 30 years of age who had encouraged Susan to leave home. Eileen was able to learn nothing of Susan's whereabouts. TR 677, 694 - 697, 722; 1441, 2125*; 3822.

and after the defendant corporation had been formed and had taken over operation of the Boston Hare Krishna temple, Susan and her "Krishna husband" returned to Boston and were admitted into the defendant's religious community. For the first several months, they stayed in "householder" apartments with married officers of the defendant. Householder apartments are extensions of the temple and under the authority of the defendant.[14] In the Fall of 1974, after Susan turned 16, she moved into the defendant's temple where she resided for the next approximately six months.[15] While Susan resided in the householder apartments and the temple, Defendant committed the following acts upon Susan

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[14] TR 765 - 767, 807 - 816, 878, 2464, 2569*, 2574*, 2610 - 2614*, 2679*, 2730 - 2732*, 3081 -3082*, 3874 - 3875, 3913 - 3915, 3985 - 3989, 4030.

[15] TR 767.

which she claims provide the basis for defendant's liability to her:

-- defendant permitted Susan to maintain her relationship with her "Krishna husband" and permitted her to be statutorily and forcibly raped by him;[16] defendant controlled the

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[16] Generally TR 877 - 891, 2612 - 2614*, 2679*, 3477*, 3527*, 3859 - 3860. The defendant accepted Susan and Doug Hewer, Susan's Husband, then known as Damaghosa, as a married couple although it was known that they were not legally married. TR 1242 - 1243, 2665 - 2666*, 3518*, 3526* - 3527*. Damaghosa was a member of the defendant's religious community. During this period, for example, he went to the morning program in the temple and served as an incense salesman for Spiritual Sky Incense. This was regarded as work for the temple, since the temple was to receive a portion of the profit from his activities. TR 743 - 744, 2331 - 2332*, 2618*, 2714 - 2716*, 3525 - 3526*. At first when Susan complained to officers of the defendant that Damaghosa was raping her, she was told that it was her position as a Krishna wife to serve her husband and to be "compassionate" with him. TR 888 - 890, 908 - 910. Damaghosa was stopped only after several months when Susan's complaints reached the President of the temple who arranged with higher Krishna authorities for a trial separation which was sanctioned in the form of a written letter from the Krishna Governing

premises where this occurred, all in violation of several criminal statutes;[17]

-- defendant failed to provide Susan with adequate food, failed to permit her adequate sleep, and failed to provide her with any education whatsoever;[18]

-- defendant accepted work from Susan at its temple (7 - 10 hours a day) and required her to beg in the streets, in bars, and in shopping malls using false pretenses and

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Body Commission, Exhibit 7. TR 909 - 914, 922 - 924, 1374, 3477*, 3509*, 3518*, 3526 - 3527*. Damaghosa was unable to accept the separation and was forced out of the defendant's temple. When he left the temple Susan no longer considered herself married to him. TR 924, 1374.

[17] G.L. c. 272 Sections 1, 2, and 6, and G.L. c. 265 Sections 22 and 23. Set out in Appendix B.

[18] TR (diet and sleep) 876, 928 - 930, 939, 3891 - 3893. For citations concerning lack of education, see note 27, infra.

flirting with men to collect substantial amounts of money (up to $200 per day; this fulfilled her quota) for the defendant despite the fact that Susan hated this work and frequently wept when forced to do it;[19] these actions constituted larceny by false pretenses;[20]

-- defendant encouraged Susan, at least partially through its religious teachings, to stay away from her mother's home[21] and interfered in

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[19] TR 808, 821 - 852, 1065 - 1066, 1171, 1193 - 1196, 1364, 2095*, 3537*, 3540*, 3574 - 3575*, 3598*, 3873, 3874, 3878 - 3884, The defendant's own expert witness, Theologian Harvey Cox, admitted on cross examination that Sankirtana conducted in this manner was not a legitimate religious activity. TR 2144, 2207, 2208.

[20] See G.L. c. 266 Section 34. See Appendix B.

[21] Since this was at least partially for the purpose of permitting her to live with Damaghosa as his wife it was for unlawful sexual intercourse and for marriage in violation of G.L. c. 272 Sections 1 and 2. See Appendix B.

Susan's relationship with her mother, teaching Susan that her mother was a meat eating demon, and that family associations were a trap for the spiritual;[22]

-- defendant taught Susan that she must be obedient to her husband and spiritual masters (including the temple president);[23]

-- defendant taught Susan that women were less intelligent than men and should in everything be guided by men, and that women's sexual appetite was nine times that of men.[24]

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[22] TR 939, 1028 - 1030.

[23] TR 995 - 997, 2342 - 2344*, 3574*, 3592 - 3594*, 3699*, 3700*, 3707* - 3708*, 3874 - 3875, 3866, 3913 - 3915.

[24] TR 1016 - 1020, 1031 - 1044, 3842 - 3844. Dr. Cox, the defendant's expert again agreed that the teachings as to the sexual appetite of women were not legitimate religious activity. 2214.

Plaintiffs presented expert witness testimony that defendant practiced techniques of coercive persuasion, "brain washing," upon Susan, that Susan was damaged psychologically by the experience for a number of reasons, one of which was the fact that she was subjected to Krishna teachings concerning women, at the ages of 15 & 16 when she was unable to evaluate them maturely.[25]

With respect to Mary Murphy the Plaintiffs presented evidence to show that the defendant encouraged Susan to remain away from home and harbored Susan in its associated apartments without Mary's consent. Mary continually begged Susan to

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[25] TR 2766 - 2768, 2780 - 2784, 2799 - 2800, 3136 - 3142, 3170 - 3171, 3919 - 3920. Susan testified that she was told that whenever she doubted Krishna beliefs or her mind was not occupied she should chant the Hari Krishna montra. TR 803 - 806. She testified that she felt humiliated and embarrassed, a requirement of coercive persuasion, by having to beg for money under false pretenses. 840.

come home. Mary felt helpless to control Susan because, each time she attempted to do so, Susan would disappear.[26] When Susan moved into the Temple building the defendant obtained Mary's "consent" through fraud promising her that it would not make Susan work as hard as adult devotees, that Susan would get adequate food and sleep and that the temple president would do the best he could to make arrangements for Susan to go to school. In fact, the temple president made only half-hearted efforts to place Susan into school, ridiculed her own efforts to find a school to go to, and later, when Susan had been convinced not to try to go to school, conspired with Susan to manipulate Mary so that Mary would drop her insistence that Susan go to

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[26] TR 932, 1452, 1454, 1455, 1506 - 1507, 1763 - 1764.

school.[27]

In the Spring of 1975, Mary, seeing that the defendant was not complying with its promises to her, insisted that Susan spend first week-ends, and then nights at home. In response to Mary's assertion of parental rights, the defendant planned to secretly send Susan to a Hari Krishna temple in Germany using a false passport to remove Susan from her mother's influence.[28] After Mary learned of the plot to send Susan to Germany, she enlisted the help of the police and required Susan to stay at home and away from the temple. The defendant sought to maintain contact with Susan and attempted

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[27] TR 859, 860, 863 - 867, 1184 - 1186, 1454, 1457, 1458, 3478 - 3483*, 3497 - 3499*, 3538 - 3539*, 3543 - 3546*, 3553*, 3564 - 3566*, 3721 - 3722*, 3889.

[28] TR 937, 938, 970, 1057 - 1059, 1441, 1452 - 1455, 1461, 1462, 1768 - 1769, 3500, 3515*, 3527 - 3528*, 3541*, 3515*, 4020, 4021.

to spirit her back to the temple.[29] Mary Murphy suffered extreme distress and upset during the time that she did not have custody of her daughter and during the extended period when Susan was alienated from her after being required to leave the defendant's temple.[30]

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[29] TR 1056 - 1059, 1077 - 1085, 1460 - 1481, 3012 - 3013.

[30] TR 1496 - 1504, 2784 - 2787.

REASONS THE WRIT SHOULD BE GRANTED

I. THIS COURT SHOULD DETERMINE WHETHER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT EXEMPTS RELIGIOUS ORGANIZATIONS ENGAGED IN RELIGIOUSLY MOTIVATED CONDUCT FROM THE GENERALLY APPLICABLE COMMON LAW TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE:

A. THIS COURT HAS NOT DECIDED THE ISSUE AND DECISIONS OF SEVERAL STATE AND FEDERAL APPELLATE COURTS TAKE CONFLICTING POSITIONS; AND

B. THERE IS A SUBSTANTIAL QUESTION WHETHER THIS CASE IS GOVERNED BY THE STANDARDS RECENTLY SET OUT IN EMPLOYMENT DIV., DEPT OF HUMAN RES. V. SMITH, Docket # 88-1213, UPHOLDING NEUTRAL LAWS WHICH MAY IMPINGE UPON FREE

EXERCISE OF RELIGION OR BY THE COMPELLING GOVERNMENTAL INTEREST TEST SET OUT IN SHERBERT V. VERNER, 374 U.S. 398 (1963)

No decision of this Court has described any limits imposed by the free exercise clause of the First Amendment upon the liability of religious organizations under generally applicable doctrines of tort law.[31] Nor has this Court decided if religiously motivated conduct can give rise to liability under the common law tort of intentional

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[31] A number of decisions limit recovery in tort based upon other clauses of the First Amendment. See e.g., N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 928 (1982) (freedom of association); New York Times v. Sullivan, 376 U.S. 254 (1964) (freedom of speech). Freedom from civil liability has its limits, see, e.g., Cohen v. Cowles Media Company, Docket No. 90-634, 55 U.S. Law Week 4773 (1991) (First Amendment provisions protecting freedom of the press do not prohibit informant from recovering, under generally applicable provisions of tort law, damages from reporter arising from fraudulent promise of confidentiality).

infliction of emotional distress.[32] Almost all of the decisions on this issue predate Employment Div., Dept of Human Res. v. Smith, supra, and analyze the issue using the now questionable "compelling state interest" test of Sherbert v. Verner, supra.

In Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal.3d 1092, 1120 - 1123 (1988) cert den. 490 U.S. 1084 (1989) tort liability for intentional infliction of emotional distress was imposed for deceptive recruitment practices using the compelling state interest and least restrictive alternative tests. See 46 Cal.3d 1112 -

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[32] Recently this Court held that First Amendment freedom of speech provisions prohibit public officials from recovering for the tort of intentional infliction of emotional distress by reason of a satirical publication unless it contained a false statement of fact made with "actual malice." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

1120.[33]

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[33] A number of California Court of Appeal decisions have imposed liability for intentional infliction of emotional distress upon religious organizations for religiously motivated activity. Two of these cases have reached this Court. In Church of Scientology of California v. Wollersheim, Docket # 89-1361, certiorari was granted and the judgment was vacated and remanded for further consideration in light of Pacific Mutual Life Insurance Company v. Haslip, Docket #89-1279; 111 S.Ct. 1032 (1991). In that case, sub nom. Wollersheim v. Church of Scientology of California, 212 Cal.App.3d 872, 260 Cal.Rptr. 331 (Cal.App.1989) the California Court of Appeal had sustained verdicts for intentional infliction of emotional distress based on the compelling state interest test (212 Cal.App.3d at 891 & 897) but substantially reduced compensatory and punitive damages awards; Haslip sustained the constitutionality of awards of punitive damages.

International Society for Krishna Consciousness of California v. George, Docket # 89-1399, was a claim by a mother and minor daughter for damages arising out of actions very similar to the actions complained of in the instant case. The California Court of Appeal in George v. International Society for Krishna Consciousness of California, 262 Cal.Rptr. 217 (1990), an opinion that was depublished by the California Supreme Court, sustained a jury verdict for the mother for intentional infliction of emotional distress, holding that, given apparently cursory instructions and the testimony in the case, the verdict could not have been based on "constitutionally

The contrary view has been taken by the SJC in this action and by the Ninth Circuit Court of Appeals in Paul v. Watchtower Bible & Tract Soc'y of New York, 819 F.2d 875, 883 (9th Cir. 1987) cert. den. 984 U.S. 926. In Paul an adult former member of a church was shunned and brought a damages action for, inter alia, "conduct causing emotional distress." The 9th Circuit denied liability on First Amendment grounds, holding that "A religious organization has a defense of constitutional privilege to claims that it has caused intangible harms -- in most, if not all circumstances." 819 F.2d at 883.[34]

The Oregon Supreme Court appears to

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protected activity." 262 Cal.Rptr. at 240 & 241. The Court of Appeal reduced the punitive damages award drastically. This Court again granted certiorari, reversed and remanded for further consideration in light of Haslip, supra.

[34] Plaintiffs argued below that Paul was distinguishable from the instant case for a number of reasons. However, those arguments were rejected by the SJC.

have a foot in both camps. It has held, in Guinn v. Church of Christ, 775 P.2d 799, (1989) that a parishioner could not recover for emotional distress suffered when elders of the church disciplined her. Citing decisions of this Court in Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 - 17 (1929) and Serbian Eastern Orthodox Diocese, etc. v. Milivojevich, 426 U.S. 696, 713, (1976), the Court held that the case was an internal issue between members of the religion and that the First Amendment prohibited secular court interference in internal ecclesiastical matters in the absence of a threat to public safety, peace or order. 775 P.2d 769 - 775. However, the Court also ruled, rejecting a free exercise defense, that the Church was liable for intentional infliction of emotional distress when, after the parishioner had withdrawn from membership

in the Church, the elders continued to denounce her as a sinner before the entire congregation. 775 P.2d 777 - 783. The Court held that:

> ... the constitutionally protected freedom to impose even the most deeply felt, spiritually inspired disciplinary measure is forfeited when the object of "benevolent" concern is one who has terminated voluntary submission to another's supervision and command...Id at 779. (emphasis supplied)

The Court concluded that after the parishioner withdrew from the congregation the elders had no First Amendment free exercise right to communicate with respect to her. Id. at 777 - 783.

Courts in a number of other states have held that intangible damages can be recovered against religious organizations. See, e.g., Baer v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105, 107 (interest in sanctity of marriage sufficient to justify imposition of liability when church ordered congregation, including plaintiff's

husband, to "shun" plaintiff) and cases cited in Section IV., infra.

This area of constitutional law became even more unsettled with the recent decision of Employment Div., Dept of Human Res. v. Smith, supra, in which this Court restricted the scope of the compelling state interest test of Sherbert v. Verner, supra, in free exercise cases. Most of the previous decisions had depended upon this analysis.

Clearly, it is time to impose some order on the law relating to the application of the free exercise clause to the common law tort of intentional infliction of emotional distress. That can only be done by this Court.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE PRIMACY, OVER FIRST AMENDMENT FREE EXERCISE RIGHTS, OF (1) THE CONSTITUTIONAL RIGHTS OF PARENTS TO CONTROL THE RELIGIOUS UPBRINGING OF THEIR CHILDREN AND (2) THE STATE'S RIGHT TO PROTECT MINORS AND TO SUPPORT PARENTAL CONTROL AND FAMILY STRUCTURE

Plaintiffs argued below that the fact of Susan's age is the paramount factor in this case and that the defendant had forfeited its First Amendment free exercise rights when it admitted Susan to its religious community without her mother's consent. The SJC, while acknowledging that Susan's minority was of "some constitutional significance" failed to assign any weight to Susan's minority in its analysis of the case. 409 Mass. at 856. Appendix 36 & 37.

The SJC rejected the Plaintiffs' contention that the defendant had lost its First Amendment free exercise protections not only as to the claims for intentional infliction of emotional distress but also as to the remaining counts.

It is clear from prior decisions of this Court that Mary Murphy had a constitutional right to direct the upbringing, including the education, religious and secular, of her daughter. "[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society" and must be zealously protected. Wisconsin v. Yoder, 406 U.S. 205, 213-214 (1972). The rights to conceive and to raise one's children are "essential to the orderly pursuit of happiness." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These are "basic civil rights of man." Skinner

v. Oklahoma, 316 U.S. 535, 541 (1942). See also Stanley v. Illinois, 405 U.S. 645, 651 (1972): "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . , the Equal Protection Clause of the Fourteenth Amendment . . . and the Ninth Amendment"); and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925) (parents' right to direct the upbringing and education of children is protected by 14th Amendment liberty interests.) See also Bellotti v. Baird, 443 U.S. 622 (1979).[35]

The state's interest in having children raised in a family environment "is no mere corporate concern of official authority. It is the interest of youth

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[35] The SJC admits, at note 15 when discussing the tort of intentional interference with parental rights, that a parent "may have what amounts to a liberty interest in the relationship between parent and child" but never applies that concept to the free exercise analysis.

itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . [individuals]." Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

This Court and other courts have repeatedly held that support for the family and the protection of children are overriding state interests sufficient to justify restriction on even the most deeply felt and explicitly required religious practices. See, e.g., Prince v. Massachusetts, supra, 321 U.S. at 170 - 171 (state's interest in protecting children's safety expressed in neutrally cast child labor laws prohibiting sale of printed materials on public streets was properly applied to prohibit children from dispensing religious literature.) Reynolds v. U.S., 145 U.S. 152 (1878) (Mormon scriptural requirements of polygamy do not

override state's decision to foster monogamy); Jehovah's Witnesses in Wash. v. King County Hosp. Unit No. 1, 278 F.Supp. 488, 504 and 505 (W.D. Wash 1967) affirmed 390 U.S. 598, reh. den. 391 U.S. 961 (1968) (state can require blood transfusions medically necessary for children despite religious prohibition).

Plaintiff asserted below and would like to assert in this Court that religious organizations have no First Amendment right to admit minors to their religious communities without the consent of the parents and that any damage thereby suffered by the children or the parents can be recovered in a tort suit, so long as generally applicable requirements for the imposition of tort liability are met.

This is a critically important issue of federal law decided by the SJC in a manner which conflicts with applicable decisions of this Court. Certiorari

should be granted on this issue.

III. THE MASSACHUSETTS SUPREME JUDICIAL COURT AND TWO FEDERAL COURTS OF APPEAL HAVE EXTENDED THE HOLDING IN BOSE CORP. V. CONSUMERS UNION OF U.S., INC., 466 U.S. 485, 499 (1984) TO REQUIRE INDEPENDENT REVIEW OF CASES INVOLVING FREE EXERCISE CLAIMS; THIS COURT HAS NEVER EXTENDED BOSE REVIEW TO FREE EXERCISE CLAIMS AND ITS INTERVENTION IS REQUIRED TO SETTLE THIS ISSUE

The SJC independently reviewed the record under Bose. The normal review, in Massachusetts, on a motion for a directed verdict or a motion for judgment notwithstanding the verdict is

> ... if anywhere in the evidence, from whatever source derived any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. If any such combination of circumstances could be found it is . . . immaterial how many other combinations could have been found which would have led to conclusions adverse to the plaintiff. And in

determining what circumstances could be found the plaintiff is entitled to the benefit of all the evidence most favorable to him, even though his own testimony may have been less favorable. Kelly v. Railway Express Agency, Inc., 315 Mass. 301, 302, 52 N.E.2d 411, 412 (1943).

There are many crucial factual issues that were presented to the jury that simply do not appear the SJC's description of the facts of this case. They are: (1) defendant failed to provide Susan with adequate food, sleep or any education while getting 7 - 10 hours of work from her each day, see text and notes at notes 18 and 19, infra; (2) the defendant used its religious teachings, along with the lack of sleep, lack of food, and the humiliation to which Susan was subjected, to brain wash her, see text and notes at notes 18, 19, 22, 23, 24 and 25, infra; (3) the householder apartments were an extension of the temple and under control of the defendant's president, see text and note at note 14, infra; (4) Susan

complained that Damaghosa, her "Krishna husband," was raping her to temple officials several times before anything was done about it and was told by them to put up with it, text and note at note 16, infra; (5) the defendant recognized the marriage between Damaghosa and Susan even though various devotees knew that they were not legally married, text and note at note 16; (6) Susan was required by the defendant's president, despite her tearful protests, to go out onto the streets and into bars to collect hundreds of dollars each day by begging and misleading people about what the money was for, see text and notes at notes 19 & 20; (7) when Susan initially ran away and was secretly harbored by various Hari Krishna temples, Mary did everything she could think of to find Susan, calling the police and the FBI among others, and thereafter Mary was afraid that Susan would run away again if

Mary exercised parental control, text and note at note 26; (8) defendant obtained Mary's consent to Susan's residence in the temple by making false assurances concerning, inter alia, Susan's schooling but actually, at times, took steps to discourage Susan from going to school and ultimately succeeded in preventing Susan from going to school, text and note at notes 27; (9) after Mary took Susan out of the temple agents and officers of the defendant kept calling Susan and tried to spirit her away from home and back to the temple, text and note at note 29.

Plaintiffs have found no other state court of last resort that has applied a Bose independent review to a free exercise defense.[36] However, two federal courts of

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[36] Bose is also cited in the analysis of George v. International Society of Krishna Consciousness, supra, 262 Cal.Rptr at 251, but only with reference to the defamation claim. The California Court of Appeal in George clearly gave substantial deference to the

appeal have done so. In New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940, 941 (1st Cir. 1989) Bose was cited as justification for independent review and ultimate reversal of a judge's decision to enter a preliminary injunction in a free exercise case.[37] In Bender v. William-sport Area School Dist., 741 F.2d 538, 542 at n. 3 (3rd Cir. 1984) vacated on other grounds 475 U.S. 534 (1986) Bose was applied to independently review and overturn a judge's decision that a school district could not deny a student religious group permission to use school

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jury's finding of fact on the free exercise issues. See 262 Cal.Rptr. at 240.

[37] But see In re The Bible Speaks, 869 F.2d 628, 630 (1st Cir. 1989) cert. den. Docket #88-1254 where the First Circuit, despite the fact that it imposed liability for fraud committed at least partially through the use of religious doctrines, applied a "clearly erroneous" standard of review and did not "reach" the defendant's contention that a Bose independent review was required because "the First Amendment is not implicated in this case." 869 F.2d at 630.

facilities for its meetings.

This Court however, has never extended Bose review to free exercise claims and has rejected several attempts to extend Bose into areas other than the determination of malice in public figure defamation cases. See e.g., Thornburg v. Gingles, 478 U.S. 30, 77 - 80 (1986) (rejecting contention that independent Bose review is appropriate in vote dilution cases, applying instead the clearly erroneous standard), Wheat v. U.S., 486 U.S. 153 (in which the court rejected a contention by the dissent that Bose review be applied to Sixth amendment right to counsel issues; Marshall, J. dissenting, 486 U.S. at 168).

Further, this Court has held that an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional

question. Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979) (finding of intent to discriminate subject to the clearly erroneous standard). It has also held that no broader review is required because the factual findings at issue may determine the outcome of a constitutional case. Maine v. Taylor, 477 U.S. 131, 145 (1986).

Whether Bose will be extended, as the SJC held in the instant case, to free exercise claims is a question of substantial importance in determining the scope of review in free exercise cases. That issue should be decided by this Court.

IV. THE LOWER COURTS CANNOT AGREE UPON A RULE TO DETERMINE ADMISSIBILITY OF RELIGIOUS TEACHINGS IN CASES IN WHICH RELIGIOUS ORGANIZATIONS HAVE EMPLOYED RELIGIOUS TEACHINGS TO AID IN THE COMMISSION OF TORTS AND TO CAUSE INJURY

A. THE SUPREME JUDICIAL COURT HELD THAT, DESPITE THE TRIAL COURT'S PROTECTIVE INSTRUCTIONS, THE FIRST AMENDMENT PROHIBITS RELIGIOUS TEACHINGS FROM BEING DESCRIBED TO A JURY WHEN THEY WERE (1) AN INSTRUMENT OF THE TORTIOUS CONDUCT; (2) A CAUSE OF INJURY; AND (3) RELEVANT TO SEVERAL ISSUES IN THE CASE

The scriptural teachings to which Susan was exposed and which she was taught to take literally (TR 1019) related, inter alia, to: (1) the importance of obedience to the spiritual master and his

representative the temple president, TR 1021 - 1026; (2) the subordinate position of women, the importance of obedience of the wife to the husband, and the importance of the wife serving the husband, TR 956 - 969, 977 - 997 and 1031 - 1045, including teachings that women are less intelligent and should consult with men before making any decision, TR 985, that a wife must tolerate wrongs by the husband even if he is not following other Hare Krishna doctrines, TR 996 & 997, that male children are better to have than female children, TR 1011 - 1014, that the sexual appetite of a woman is nine times greater than that of a man, TR 1017 & 1020, that an appropriate reaction to sexual attraction is to spit at the woman, TR 1043 & 1044, and that a woman is declared in the scripture to be the way of death for the advancing devotee, TR 1045; (3) that temporal family is merely an

illusion, TR 1010 & 1028 - 1030, including that the best service to parents is to make them Krishna conscious, TR 1002, 1010 - 1011, 1028 - 1030; (4) that non-devotees should not be trusted and that association with non-devotees is dangerous and contaminating, TR 1024 - 2026 & 1035 - 1037.

This information was exceedingly relevant to the issues in the case. The defendant's teachings were one of the means by which defendant committed its tortious conduct. They provided explanations of many of Susan Murphy's actions. They were, for example, used by the defendant to provide a rationale for Susan to stay away from home and to make her amenable to its direction. The teachings were also a substantial motivating factor for the other members of the defendant's religious community in harboring Susan and interfering with

Mary's parental rights. The teachings of female inferiority, of Susan's need for direction from men and from spiritual authorities, and the undermining of Susan's prior beliefs were all instruments used by the defendant in brain-washing Susan. Further, because of the age at which Susan was exposed to these teachings, they contributed to the damage that this experience caused to her self-esteem and psychological development. Plaintiffs' case, without evidence concerning Susan's exposure to the Krishna religious teachings, would be substantially prejudiced.

The SJC noted that the trial judge charged the jury, at the time this information was placed into evidence, that the testimony was "being placed before you for you to determine whether or not such information was brought to [Susan's] attention and how if at all it affected

her or caused her to act, or not to act, or [whether] other persons were [caused] to act in certain ways." 409 Mass. at 854. Appendix p. 30. But the SJC did not include the entire instruction. Just before the language quoted above the judge instructed the jury,

> Mr. Foreman and ladies and gentlemen of the jury, the line of inquiry, at the moment, touches upon the religious beliefs of Hare Krishna religion. The religious beliefs of this religion are not at issue. I emphasize that to you. TR 956

At least twice before, the judge had instructed the jury that the defendant's religious beliefs were constitutionally protected. TR 651 & 652, 671 & 672. In his charge, after the end of the presentation of evidence, the trial judge again instructed the jury that belief was protected and could not form the basis for a judgment. A description of some of the instructions and of the charge are set out at Appendix pp 64 et seq.

The question presented is how to permit, without infringing on First Amendment free exercise rights, the presentation of a case in which a religious organization made its teachings part and parcel of its tortious conduct. The solution worked out by the trial judge was traditional and constitutionally correct. He let the evidence in and frequently instructed the jury as to how it should be used, and that belief could not be the basis for liability.[38]

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[38] Actually, the trial judge went out of his way to demystify the Krishna practices stating in his charge that "proselytization" is an "accepted and encouraged practice in most regions of the world . . . the use of altars, teachings from scriptures, the presence of holy scrolls, statues of holy figures are commonplace in western religions as well as eastern religions. Such uses are widespread, accepted and appropriately utilized in the conduct of the free exercise and free conduct of one's religion. Fund raising is not only permitted but parallels in many instances the practice in fund raising as described by the defendant corporation. Though aspects of that might well be in controversy." See Appendix p. 81.

This was not acceptable to the SJC which focused on the fact that religious texts that Susan specifically remembered having been taught when she was in the defendant's religious community were read to the jury at length. TR 970 et seq. The SJC held that:

> [T]he nature of the challenge to the defendant's religious beliefs posed by the disputed scriptural testimony in the present case embroils the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs. 409 Mass. at 856. Appendix 36 & 37.

One wonders what "challenge" and what "assessment" the SJC is referring to. The "challenge" in this case was certainly not

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Apparently the SJC would prefer that no one comment on the substance of the religious beliefs and practices of the defendant; that we pretend they are just not there. Such a result would be even worse for a minority religious organization than full disclosure because the jury would be left with whatever negative impressions it brought into the jury box or inferred from testimony that tried to dance around the issue. Once the religious organization sought to discuss these issues in front of the jury it could well be held to have waived its privilege.

to the truth of the Krishna beliefs. Totally absent from the record is any attempt to show that any Krishna teachings were untrue. All that was shown was that they affected the plaintiffs (and the devotees) in the context of the defendant's tortious conduct.

The only "challenge" made by the plaintiffs to the defendant's beliefs was that the beliefs were taught to a minor without her mother's consent. Plaintiffs contended that such teachings were part of the overall pattern of tortious conduct of the defendant toward the plaintiffs. The only "assessment" that the jury was asked to make was of the damages caused to Susan and Mary by the defendant's tortious conduct.

It was not the plaintiffs who mixed Krishna religious teachings with tortious conduct. This problem was created by the defendants' own wrongdoing and the fact

that it used its teachings as an instrument of its tort. It would be exceedingly unjust to make it impossible for plaintiffs to present their case or to obtain full damages, because of the actions of the wrongdoer. Such a result runs contrary to the very basics of American jurisprudence. Nor does it protect legitimate religious observance.

B. SOLUTIONS OF OTHER COURTS

While there are very few decisions which directly discuss the admissability of religious teachings, the approach of some courts can be inferred from their rulings on the circumstances when liability may be based on religious teachings.

The type of analysis by the SJC which focuses on the protected activity to the exclusion of everything else was presaged by the Ninth Circuit in Paul, supra.

The California courts take a different approach. The California Supreme Court in Molko, supra, reviewed judgments based on motions for summary judgment. It therefore did not have to face the question of how to deal with religious teachings in an actual trial. [39]

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[39] The SJC at page 19 of the decision asserted that the California Supreme Court in Molko, supra, held that "courts will not consider threats of divine retribution as a basis for [a]

However, the California Court of Appeal in George, supra, took the route of the trial court in the instant case and approved of the presentation of relevant evidence with a general protective charge. 262 Cal.Rptr. at 240. The protective instructions in George appear to have been much less extensive and emphatic than the

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claim of intentional infliction of emotional distress" citing 46 Cal.3d 1120. However, the Molko Court did not say exactly that. Immediately after the quoted language it stated:

> To the extent the claims are based merely on threats of divine retribution if Molko ... left the church, they cannot stand... However, the claims do not rest solely or even primarily on threats of divine retribution. Molko ... essentially contend[s] that the same conduct that supports [the] fraud actions, i.e., misrepresentation and concealment of the Church's identity for the purpose of inducing [him] to submit unknowingly to coercive persuasion -- also gives rise to an action for intentional infliction of emotional distress. 46 Cal.3d at 1120. (emphasis supplied).

The California Supreme Court accepted Molko's contention and imposed liability.

instructions given in the instant case. The California Court of Appeal in Wollersheim, supra, took the position that some religious practices were not protected to the extent that the participants were coerced into participating in them and that the First Amendment protection of other religious practices was reduced because of their coercive nature. 212 Cal.App.3d 891 - 899. Clearly, the Wollersheim Court would admit evidence of religious teachings when, as in the instant case, there was evidence of coercion.

In Bush v. Carrieri, 419 P.2d 132, 137 (Wash. 1966) the Washington Supreme Court imposed liability for alienation of affections when a pastor told plaintiff's wife to leave him or else face divine punishment because plaintiff was "full of the devil." The Court held that the act of interfering with a marriage relation

was not protected. The SJC's analysis would have focused on the fact that the wife had received a religious teaching and that damages could not be assessed for that teaching. However, at least these religious teachings, the means by which the tort was conducted, were admitted into evidence in that case.

The First Circuit Court of Appeals, has entertained an action to compel a religious organization to refund multimillion dollar donations obtained by it through undue influence. In re the Bible Speaks, 869 F.2d 628 (1st Cir. 1989) cert. den. Docket # 88-1254. The court simply classified the conduct as secular despite the fact that there was a clear intermixture of religious teaching, religious conduct and fraudulent practice. For example, with respect to the $5,000,000 donation, the court listed four factors which lead it to find that the

gift was given under undue influence: The first was plaintiff's testimony that:

> I felt that my money had great power and I felt that -- I even became to feel that my money -- that in giving money to The Bible Speaks that I could change the course of history. I could change human history.

This belief was fostered, not only by false statements of fact, but by one Stevens, the pastor of The Bible Speaks, who according to its religious doctrine was someone the plaintiff had to obey "because he was the highest authority on earth." 869 F.2d at 632. The second reason given by the court for the finding of undue influence was that plaintiff didn't tell her family because Stevens told (taught) her that Satan was controlling her husband. 869 F. 2d at 643. The other two factors were false statements that a minister associated with TBS had been detained in Romania and that the migraine headaches, suffered by Stevens' fiance, had been cured by a

previous gift of $1,000,000. Clearly, the undue influence practice by The Bible Speaks was partially comprised of religious teachings. However, the First Circuit concluded that:

> The [free exercise] clause does not allow purely secular statements of fact to be shielded from legal action merely because they are made by officials of a religious organization....
>
> Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS [The Bible Speaks] or the beliefs of its adherents. The findings and rulings rest solely on secular statements and actions.... Those who run TBS may freely exercise their religion but they cannot use the cloak of religion to exert undue influence of a non-religious nature with impunity. The [gifts] might have had their seeds in the religious beliefs of plaintiff but they were both nurtured and brought to fruition by misstatements and distortions of fact that had no basis either in the religious tenets of TBS or in the plaintiff's religious beliefs. 869 F. 2d at 645 & 646

While the First Circuit may not have based liability on religious teachings, it obviously found them relevant and admissible.

Like the religious teachings in TBS, the teachings in this case were part of the torts practiced upon Susan Murphy. If the same analysis were applied to the instant case, the various teachings, especially those concerning the intelligence of women, the passion of women, and that a woman should be guided by men and the temple president could well be secular statements, designed to further the tort and liability would attach to them.

Two other decisions give further evidence of the variety of thought in this area. In Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987) the Missouri Court of Appeals held that:

> The intentional interference with [a marriage] relationship by a third person ... is a threat to the public welfare and order [which] the law may redress, the right of free exercise of religion notwithstanding. Where, however, the interference involves merely the preachment or doctrine or advocacy of

religious faith, without unlawful or improper motive, no paramount state concern is affected, and the alienation is not actionable." 723 S.W.2d at 555 [Citations omitted, emphasis supplied].

The Oregon Court of Appeals has required that for liability to attach for statements having a religious character and made by a religious organization, the court must find that they were "nonetheless made for a wholly secular purpose." Christofferson v. Church of Scientology, Etc.. 57 Or. App. 203, 644 P.2d 577, 602 (1981). This means at least that statements of a religious character could be admitted if wholly secular.

The issue is of substantial constitutional significance. It should be decided by this Court.

For the above reasons the plaintiffs request this court to grant the petition.

Petitioners by their attorney,

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July 29, 1991

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N-5378 S.J.C.

SUSAN MURPHY & another[1] vs. I.S.K.CON. OF NEW ENGLAND, INC.

Norfolk. Sept. 6, 1990. - May 1, 1991.

Present: Liacos, C.J., Wilkins, Abrams, Nolan, Lynch, O'Connor, & Greaney, JJ.

Religion. Constitutional Law, Freedom of religion. Parent and Child, Companionship and society, Interference with parental rights. Interference with Parental Rights. Emotional Distress. Negligence, Duty to prevent harm. Actionable Tort. Corporation, Religious. Practice, Civil, Amendment. Damages, Apportionment, Tort.

44Civil action commenced in the Superior Court Department on April 19, 1977.

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[1] Mary Murphy.

The case was tried before Robert W. Banks, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David Kelston (David Liberman with him) for the defendant. James A. Frieden for Susan Murphy.

Mary John Boylan (Francis J. O'Rourke with her) for Mary Murphy.

David A. Hoffman c John Reinstein, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

LIACOS, C.J. On June 16, 1987, a jury awarded $610,000 to the plaintiffs Susan Murphy and her mother, Mary Murphy, for damages arising out of their involvement with the defendant, I.S.K.Con. of New England, Inc. (ISKCON N.E.). The defendant now appeals claiming that the trial below constituted a "heresy trial" and that the jury's verdicts against the defendant represent an impermissible restraint on ISKCON N.E.'s right to practice freely its religion. The defendant argues that one of the plaintiffs' claims, for intentional interference with parental rights, does not exist under the common law of the Commonwealth. The defendant also alleges that the plaintiffs did not present sufficient evidence to meet their burden of proof on their tort claims and that the verdicts are invalid due to the judge's erroneous jury instructions. Finally, the

defendant claims that the trial judge improperly deprived ISKCON N.E. of the protection of a statutory liability limit of $20,000 for charitable organizations. Based on our review of the record, we conclude that the trial below impermissibly infringed on the defendant's right to practice freely its religion. Accordingly, we vacate the judgments against the defendant for the counts of intentional infliction of emotional distress, and order entry of judgment for the defendant on those counts. We remand the case for retrial on the claims of intentional interference with parental rights, breach of a duty of care, and vicarious liability for assault and battery.[2]

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[2] In light of our disposition of the various claims of error, and our order for retrial of some of the plaintiffs' claims, we do not reach the issue of limitation of liability.

1. Facts. We present a brief description of the facts the jury could have found, based on the evidence put before it. Additional facts will be discussed in later sections of this opinion as they become relevant to our legal analysis.

This case originated in Randolph in the winter of 1971 when Susan Murphy, then thirteen years old, began to explore the beliefs of the Hare Krishna religion, also referred to as Krishna Consciousness.[3] At this time Susan occasionally attended Sunday feasts at a Krishna temple located in Boston. During the summer of 1972, Susan began to attend the temple more frequently after she became acquainted

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[3] The religious status of Krishna Consciousness or ISKCON N.E. was not at issue in the trial below. The plaintiffs stipulated that Krishna Consciousness is an established religion and that ISKCON N.E. is a religious organization sincerely dedicated to the ideals of Krishna Consciousness.

with Doug Hewer, a nineteen or twenty year old occasional practitioner of Krishna Consciousness. At some point during the fall of 1972, Susan and Doug became girl friend and boy friend.

Susan's mother, Mary Murphy, remained unaware of Susan's interest in Krishna Consciousness or her attendance at the Boston Krishna temple until February or March, 1973. Mary forbade Susan from visiting the temple again, but Susan continued to attend the temple without informing her mother.

In February, 1973, Susan and Doug met with Vishnu-Jana, a Krishna sannyasi, or swami,[4] to discuss Susan's desire to become "Krishna conscious" by living according to the principles of Krishna Consciousness. Susan also told Vishnu-Jana of her mother's unwillingness to

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[4] In the Krishna Consciousness religion, a "swami" is a spiritual authority.

allow Susan to attend the Boston temple. Vishnu-Jana told Susan and Doug that the most important goal for Susan was to become Krishna conscious, and that she should do what was necessary to attain that goal. After the meeting, Susan and Doug considered themselves married to each other by the power of Vishnu-Jana's advice. From then on, they presented themselves as a married couple, with Susan wearing traditional Krishna symbols of marriage. At this time, Susan was fourteen years old.

About March, 1973, Susan ran away with Doug to Toronto, Canada, and then to Los Angeles, California. During their travels, Susan and Doug received the assistance and friendship of several Krishna Consciousness practitioners. Susan, after speaking with her mother on the telephone, returned to Massachusetts in the fall of 1973 with Doug and resumed

living with her mother. Approximately two months after returning to Massachusetts, Susan and Doug ran away again to Toronto. From Toronto, Susan and Doug traveled to Los Angeles, where they remained for several months. During this time, Susan and Doug regularly visited a Krishna temple in Los Angeles. Susan and Doug then moved to Hawaii until late 1973 or early 1974, when they returned to Massachusetts and took up residence together. Several weeks after their return to Massachusetts, Susan and Doug left once again for Los Angeles. They remained in Los Angeles for several weeks before traveling to Pittsburgh, Pennsylvania, where they resided in a local Krishna temple.

The defendant ISKCON N.E. was incorporated in Massachusetts on February 19, 1974. Some time during the summer of 1974, Susan returned to Massachusetts with

Doug to assist Mary in certain legal proceedings unrelated to the present case. For one month Susan and Doug lived together in a rented room. They then moved into the apartment of Traidas and Pramada, members of ISKCON N.E.'s temple. Susan testified that at this time Traidas was the president of the temple. Susan attended the defendant's temple and participated regularly in temple activities. On August 14, 1974, Susan celebrated her sixteenth birthday.

Around September, 1974, Susan and Doug moved into the apartment of Carol and Larry DeGregory, two other members of ISKCON N.E.'s temple. Evidence indicated that Larry was the temple's treasurer. In November, 1974, after moving to another apartment, the two couples requested permission from the temple's president, Adi Kesava, to move into the defendant's temple. Adi Kesava told Susan that she

could live in the temple only with her mother's permission, and only if Susan would adhere to the Krishna practices of a vegetarian diet, no illicit sex, no intoxicants, no gambling, and regular participation in temple activity. Susan agreed to these conditions and arranged for Adi Kesava to speak with Mary Murphy who, on certain conditions, consented to Susan living in the temple.

In November, 1974, Susan and Doug moved into ISKCON N.E.'s temple. Susan slept in the women's quarters; Doug slept in the men's quarters. Doug left the temple shortly thereafter, apparently in response to a disagreement with Susan regarding her desire to remain celibate in accordance with Krishna principles. After Doug left the temple, Susan no longer considered herself married to him. During her stay in the temple, Susan participated regularly in chores, rituals,

and classes associated with the temple and the practice of Krishna Consciousness. This continued until December, 1974, or January, 1975, when Mary asked Susan to sleep at home on weekends. Susan agreed, but continued to spend most of her time at the temple. Shortly after Susan was formally initiated as a Krishna Consciousness "devotee" in January or February, 1975, Susan began spending every night at Mary's house, although she continued to spend her days at the temple.

In April, 1975, Mary discovered a letter written by Susan which alluded to a "plan" by several members of the defendant's temple to send Susan to West Germany without Mary's knowledge or permission. At this point, Mary telephoned the Weymouth police department and spoke with Officer Henry Vanasse, who agreed to speak to Susan. Mary telephoned Susan at the temple and asked Susan

to come home on the pretext that Mary was ill. When Susan arrived, Mary told her that she could not go back to the temple. A brief struggle ensued, but Mary was able to restrain Susan until Officer Vanasse arrived. He informed Susan that she risked legal action against her if she continued to run away. Mary demanded that Susan sever all ties with the defendant's temple, to which Susan reluctantly agreed.

Evidence was presented regarding Susan's emotional condition after her withdrawal from the defendant's temple. This evidence showed that Susan remained quite angry with her mother for several months, and that Susan expressed a desire to return to the temple. Susan's and Mary's relationship began to improve after approximately six months when Susan decided that she no longer wanted to associate with the temple or its members. Additional evidence was presented which,

the plaintiffs claimed, established that Susan's experience with the defendant caused Susan to experience "post-traumatic stress disorder," a low sense of self-esteem, and an inability to maintain a healthy relationship with men. On April 19, 1977, Susan and Mary filed a complaint in the Superior Court alleging nine counts of tortious activity against (1) ISKCON N.E., (2) ISKCON, a Krishna temple located in California, and (3) A.C. Bhaktivedanta Swami Prabhupada, the founder of Krishna Consciousness in the United States. The plaintiffs sought $2,500,000 as compensation for their alleged injuries. The defendants filed motions to dismiss the complaint, which were referred to a special master. Following the master's report, the plaintiffs amended their complaint to substitute a Krishna temple in New York for the California temple, to delete one of the nine causes of action,

and to lower the damages sought to $1,000,000.

In April, 1985, the California temple moved to adopt the master's report and to dismiss the California temple from the case. This motion was allowed. The court also allowed a motion to dismiss the complaint against A.C. Bhaktivedanta Swami Prabhupada. In addition, the court dismissed the complaint against the New York temple.

ISKCON N.E. moved for summary judgment as to each count in the plaintiffs' amended complaint. After a hearing, the judge granted summary judgment for the defendant on Susan's claim of false imprisonment, Susan's claim of fraud on the part of ISKCON N.E., and Mary's claim of seduction. The case proceeded to trial on May 11, 1987, on the following counts: (1) Susan's claim that ISKCON N.E. failed in its duty to provide adequately for her

welfare while she was under its care; (2) Susan's claim that ISKCON N.E. aided and abetted Doug Hewer in committing assault and battery on her by way of nonconsensual sexual intercourse; (3) Susan's claim of intentional infliction of emotional distress; (4) Mary's claim of intentional infliction of emotional distress; (5) Susan's claim of intentional interference with the Murphy family structure; and (6) Mary's claim of intentional interference with the Murphy family structure. The judge limited the defendant's potential liability to its actions for the period between ISKCON N.E.'s Incorporation and Susan's departure from the temple. Following the plaintiffs' presentation of evidence, the defendant moved for a directed verdict on all counts. The court dismissed Susan's claim of intentional interference with the Murphy family structure, but otherwise denied the

motion. The defendant's motion for directed verdict at the close of all the evidence was also denied.

On June 16, 1987, the jury found for the plaintiffs on all remaining counts. The jury awarded Susan $210,000 for the intentional infliction of emotional distress, and $30,000 for ISKCON N.E.'s failure to provide for her welfare, $10,000 of which was attributable to ISKCON N.E.'s failure to protect her from assault and battery by third persons. Mary received $350,000 for the intentional infliction of emotional distress, and $20,000 for the intentional interference with her parental rights. The defendant's motions for new trial and for judgment notwithstanding the verdict were denied. The defendant filed a notice of appeal. We took the case on our own

motion.[5]

2. The free exercise of religious rights.[6] ISKCON N.E claims that the jury's verdicts must be struck down as a violation of both State and Federal guarantees of the free exercise of religion.[7] In support of its argument, the defendant points to the fact that the plaintiffs presented substantial and detailed evidence regarding ISKCON N.E.'s religion. The defendant claims that the introduction of this evidence allowed the jury to

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[5] The plaintiffs have filed a cross appeal regarding certain rulings of the trial judge. See section 4 infra.

[6] We acknowledge with appreciation the amicus brief submitted by the Civil Liberties Union of Massachusetts.

[7] Although the defendant cites art 2 of the Massachusetts Declaration of Rights, the arguments in its brief to this court are based on a discussion of the rights of free exercise granted under the First Amendment to the United States Constitution. Accordingly, we shall confine our consideration of the defendant's claims to the context of the First Amendment.

punish ISKCON N.E. for the content of its unorthodox religious beliefs through the imposition of tort liability, thereby depriving ISKCON N.E. of its constitutional right to practice freely its religion. In the unique circumstances of this case, we agree with the defendant.

In considering ISKCON N.E.'s free exercise claim, we recognize our duty to conduct an independent review of the record of the trial below. "[I]n cases raising First Amendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation 'to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'". Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984), quoting New York Times Co. v.

Sullivan, 376 U.S. 254, 284-286 (1964). See Gaudiya Vaishnava Soc'y v. San Francisco, 900 F.2d 1369, 1373 (9th Cir. 1990) ("We conduct an independent review of the record to be sure that the 'speech in question actually falls within the protected category,' and to determine whether the constitutional factors have properly been applied"). Furthermore, in examining the record below, we recognize that, "where a jury's general verdict may have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds" (emphasis in orig-inal). Founding Church of Scientology v. United States, 409 F.2d 1146, 1164 (D.C. Cir.) (per curiam), cert. denied, 396 U.S. 963 (1969). See Gregory v. Chicago, 394 U.S. 111, 113 (1969); Stromberg v. California, 283 U.S.

359, 367-368 (1931).

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The courts of both the United States and this Commonwealth are required to ensure that individuals or organizations are not unjustly deprived of their right to exercise freely their religious beliefs. See, e.g,, Cantwell v. Connecticut, 310 U.S. 296 (1980) (breach of the peace conviction of a Jehovah's witness overturned as a violation of First Amendment free exercise clause); Madsen v. Erwin, 395 Mass. 715, 724 (1985) (civil rights and contract claims by lesbian employee against the First Church of Christ, Scientist dismissed as a violation of First Amendment free exercise clause). We have recognized previously that the

imposition of tort liability for conduct that is allegedly connected to religious belief, such as is involved in the present case, presents a sufficient potential deprivation of religious freedom to warrant constitutional scrutiny. See Alberts v. Devine, 395 Mass. 59, 74, cert. denied sub nom., Carroll v. Alberts, 474 U.S. 1013 (1985). See also Molko v. Holy Spirit Ass'n for Unification of World Christianity, 46 Cal. 3d 1092, 1114 (1988), cert. denied, 490 U.S. 1084 (1989).

Freedom of religion, however, while occupying a "preferred position ... in the pantheon of constitutional rights," Madsen v. Erwin, supra at 724, is not ab-solute. Commonwealth v. Nissenbaum, 404 Mass. 575, 581 (1989). Both this court and the United States Supreme Court have recognized that the concept of the free exercise of religion involves both belief

and activity, and, while the freedom to believe particular religious principles is absolute and may not lawfully be infringed, the freedom to act in response to religious beliefs does not enjoy the same immunity. See Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. 1595, 1600 (1990); Attorney Gen. v. Bailey, 386 Mass. 367, 374-377, cert. denied, 459 U.S. 970 (1982). "[The First] Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, supra at 303-304.

The constitutional difficulty with the basis of the jury's verdicts against ISKCON N.E. lies not in any perceived infringement of the defendant's right to engage in religiously motivated activity,

but rather in the risk of infringement of ISKCON N.E.'s right to believe freely in the principles of Krishna Consciousness. This potential for infringement arose when the trial judge allowed in evidence, as the basis of the plaintiffs' claims, certain passages from the scriptural texts of the Krishna Consciousness religion. See Founding Church of Scientology v. United States, supra at 1164 ("where a jury's general verdict may have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds" [emphasis in original]).

Susan was permitted to read scriptural passages aloud to the jury and to testify as to what she had learned at the temple regarding this material. Of particular concern is Susan's testimony

regarding scriptural text which pertained to the role of women and of family in the Krishna Consciousness religion. In regard to the plaintiffs' claim of intentional infliction of emotional distress, the defendant refers to sections of the trial transcript in which Susan testified that she learned, in reference to particular scriptural passages, that: (1) "women are inferior to men"; (2) "the female form is the form of evil"; and (3) "one should be very careful to cover the body so that men are not attracted to [women]."[8] The defendant also claims that this testimony formed the basis of the opinion of the

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[8] Our review of the record in this case reveals that Susan also testified that she learned from the study of certain scriptural texts that: (1) "it is better for a woman to have to bear a son and that female children are not as good as male children"; (2) "[women] should always consult a higher person before making any type of decision because women are less intelligent than men"; and (3) "the woman has no position which is independent of man and she should take her husband as her spiritual authority."

plaintiffs' expert psychiatric witness that Susan suffered from "post-traumatic stress disorder" from her "experience in the Hare Krishna movement."

In regard to the plaintiff's claim of intentional interference with parental rights, the defendant points to Susan's testimony that she learned from particular scriptural passages and prayers that: (1) the earthly family was a perversion of the Krishna family; (2) the earthly family was "inconvenient" and "nonexistent"; (3) "in the span of eternity, [her] life was nothing, and that [her] relationships with [her] family and friends were nothing only if [she] could make them Krishna conscious"; and (4) "our families in this life are not our real families ... [t]hey are just an entanglement in the material world."

The defendant also points to the fact that Susan was allowed to read to the jury

a scriptural passage, which she had been told to believe literally, about an incarnation of Krishna coming to Earth to kill violently a parent opposed to his child's participation in the Krishna religion.[9] The defendant claims that the plaintiffs utilized this testimony to support their claim that ISKCON N.E. had intentionally sought to separate Susan from her mother. The defendant argues that, because the plaintiffs' claims of intentional infliction of emotional distress and intentional interference with parental rights found their basis in the content of the teachings of ISKCON N.E.'s

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[9] The defendant also points to substantial other testimony offered by the plaintiffs, such as ISKCON N.E.'s worship of certain plants and offerings of food to temple deities, as providing additional opportunities for the jury to punish ISKCON N.E. for its unorthodox religious beliefs. Because we conclude that the presentation of the scriptural testimony we have described above was sufficient to endanger the defendant's free exercise rights, we need not address the effect of this other evidence.

religion, the litigation of these claims allowed the jury to penalize ISKCON N.E. for its adherence to unpopular religious beliefs.

The plaintiffs do not deny that Susan's testimony allowed the jury to consider the content of the defendant's religious scriptures. Indeed, in their brief to this court, the plaintiffs note that "[some of the plaintiffs' damages flow from the religious beliefs and practices to which Susan Murphy was exposed while she was a member of the Defendant's religious community." The plaintiffs suggest, however, that Susan's claim is not based on the defendant's religious beliefs per se, but rather on ISKCON N.E.'s actions of teaching those beliefs to Susan. This religious activity, they argue, unlike religious belief, may be regulated through tort liability without violating the

defendant's right to the free exercise of its religion. See, e.g., Alberts v. Devine, 395 Mass. 59, 74, cert. denied sub nom. Carroll v. Alberts, 474 U.S.. 1013 (1985) (First Amendment free exercise clause does not bar imposition of tort liability for religiously motivated activity which amounts to a breach of physician-patient con-fidentiality).

As we have already noted, religiously motivated activity is not categorically immunized from tort liability by the free exercise clause of the First Amendment. However, we are of the view that the plaintiffs' attempt to characterize the disputed testimony as relating to the defendant's religious activity rather than its religious belief is unpersuasive. The essence of what occurred in the trial is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant's

religious beliefs was sufficient to cause tortious emotional damage and to separate Susan from her mother. Our conclusion in this regard is supported by the words of the judge who, in allowing the disputed scriptural testimony, instructed the jury that "[this testimony is] being placed before you for you to determine whether or not such information was brought to [Susan's] attention and how if at all it affected her or caused her to act, or not to act, or [whether] other persons were [caused] to act in certain ways."[10] In his closing argument to the jury the plaintiffs' counsel stated that "Susan was subjected at an early age to de-structive

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[10] In a sidebar conference regarding the form in which the scriptural text could be presented to the jury, the judge stated that, "[i]f [Susan] would like to testify as to certain passages that were taught to her, which she recalls, and which will later be testified to as bearing upon emotional distress, or psychological impact, or psychological damage, then they are admissible as being relevant."

teachings, teachings that were destructive to her personality, to her psyche, and Doctors Zinberg and Norberg and Carroll (the plaintiffs' expert witnesses) testified to this, and she suffers from it today."

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.... It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution." (Citation omitted.) United States v. Ballard, 322 U.S. 78, 86 (1944). In recognition of our nation's commitment to freedom of religious belief, it has become axiomatic that "[courts cannot question the verity of religious doctrines or beliefs." Madsen v. Erwin, 395 Mass. 715, 722 (1985). "Men may believe what they cannot prove. They may not be put to

the proof of their religious doctrines or beliefs." United States v. Ballard, supra at 86. Yet, in the present case, the defendant has been required to do what the First Amendment has forbidden; it has been forced to attempt to prove to a jury that the substance of its religious beliefs is worthy of respect.

Inherent in the claim that exposure to ISKCON N.E.'s religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed and inconsistent with a proper notion of human development. While this issue may be the subject of a theological or academic debate, it has no place in the courts of this Commonwealth. In a similar manner, the issue whether the Krishna Consciousness religion adheres to an appropriate vision of the family is not for the courts to decide. The defendant cannot be forced to choose between

censoring its religious scrip-tures to remove material which may be offensive to contemporary society and paying tort damages for the privilege of maintaining unpopular religious beliefs. "Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices - or against its members.... Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort.... Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless." (Citation omitted.) Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 883 (9th Cir.), cert. denied, 484 U.S. 926 (1987). See Madsen v. Erwin, supra at 725 (requiring defendants to pay damages to maintain their religious beliefs would sub-

stantially burden the defendants' right to free exercise of religion). "Tolerance of the unorthodox and unpopular is the bellwether of a society's spiritual strength. A community suffficiently confident of its moral and political underpinnings trusts its members to employ reasoned and considered judgment in evaluating novel theories that seek to explain the meaning and purpose of life. The coercive mechanisms of restraint, violence, and suppression are not required to confront strange ideologies and unfamiliar rituals, however obnoxious they may be. This freedom to explore diverse political and religious doctrines, derived from the establishment and free exercise clauses of the First Amendment, permits our citizens to follow the dictates of conscience. By fostering this voluntarism, our nation is strength-ened, for the people respect a government that

treats its charges as free-willed, discerning moral beings. Our republic prides itself on the enormous diversity of religious and political beliefs which have been able to find acceptance and toleration on our shores." International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432 (2d Cir. 1981).

The plaintiffs argue that the fact that ISKCON N.E. exposed Susan to the disputed teachings while she was a minor should persuade this court to deny the defendant's free exercise claim. In Prince v. Massachusetts, 321 U.S. 158, 167-170 (1944), the United States Supreme Court recognized that a State has greater leeway under the First Amendment to infringe on religious activity involving children than it does on religious activity which involves only adults. In upholding the enforcement of a Massachusetts child labor law which prevented

proselytizing activity by children of Jehovah's Witnesses, the Court states that "[t]he state's authority over children's activities is broader than over like actions of adults.... What may be wholly permissible for adults ... may not be so for children...." Id. at 168-169.

While we agree with the plaintiffs that Susan's minority is of constitutional significance, we are not persuaded that her age alleviates the free exercise concerns raised by the jury's evaluation of the defendant's religious beliefs. The fact that Susan was a minor when she was involved with the defendant may lessen the degree of constitutional protection which ISKCON N.E. has against a claim of an intentional tort based on religiously motivated activity. However, the nature of the challenge to the defendant's religious beliefs posed by the disputed scriptural testimony in the present case

embroils the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs. This court may not engage in such deliberations. See Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 1120 (1988), cert. denied, 490 U.S. 1084 (1989) (court will not consider threats of divine retribution as basis for claim of intentional infliction of emotional distress.)[11]

Additionally, by allowing the jury inappropriately to consider constitutionally protected religious beliefs in determining the defendant's liability, the judge also exacerbated the problem by

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[11] Our conclusion on this point also is influenced by the fact that the religious scriptures were taught to Susan at regularly scheduled temple meetings. "[It is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)

erroneously instructing the jury regarding the extent of the free exercise protections afforded by the First Amendment. The judge instructed the jury that "[t]he tort of intentional infliction of emotional distress is not protected by the umbrella of the First Amendment. The tort of intentional interference with parental custody is not protected by the shield of the First Amendment." This instruction does not accurately reflect applicable constitutional law and may have invited the jury to ignore the defendant's free exercise rights in determining ISKCON N.E.'s tort liability.[12]

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[12] The plaintiffs claim that the defendant failed to object properly to the judge's charge to the jury and therefore must be considered to have waived any objection in that regard. We disagree. Our review of the record indicates that the defendant objected specifically to the judge's charge that the torts alleged by the plaintiffs were not conduct protected by the First Amendment. Furthermore, regardless of the propriety of the defendant's objections to the charge, "a denial of First Amendment

Both this court and other courts have recognized that the free exercise protection provided by the First Amendment is not automatically withheld from activity which constitutes an intentional tort. The decision whether the free exercise clause bars a particular tort action is not necessarily determined by the presence of tortious activity but by other factors such as the nature of the evidence which must be presented to support such a claim, or the effect that liability for a successful claim would have on free exercise rights. In Madsen v. Erwin, supra, for example, this court held that, due to the nature of the evidence on which the plaintiff intended

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rights is one of those exceptional instances where an appellate court will notice error in the charge even where no objection is made at trial." Founding Church of Scientology v. United States, 409 F.2d 1146, 1164 n.2 (D.C. Cir.) (per curiam), cert. denied, 396 U.S. 963 (1969).

to support her claims, which included the intentional infliction of emotional distress, the free exercise clause of the First Amendment required that summary judgment be granted for the defendant religious organization. "[L]itigation [of the plaintiff's claims] would involve the court in a review of an essentially ecclesiastical procedure.... That is impermissible under the First Amendment. " Id. at 7 24.

Other courts have extended free exercise protection to bar recovery for intentionally tortious activity. In Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., supra at 879-883, the United States Court of Appeals for the Ninth Circuit held that the First Amendment free exercise clause provided a complete defense to claims of outrageous conduct, defamation, invasion of privacy, and fraud. The court noted that free exercise

concerns barred recovery despite the "real and not insubstantial" harms suffered by the plaintiff at the hands of the defendant religious organization. Id. at 883. And in Molko v. Holy Spirit Ass'n for Unification of World Christ-ianity, supra at 1120, the Supreme Court of California held that claims of intentional infliction of emotional distress are barred by the First Pmendment to the extent they are based on protected religious speech. See also Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1142 (D. Mass. 1982) (noting that if essential element of plaintiff's fraud claim rests on alleged falsity of constitutionally protected religious statements the tort claim must fail); Miller v. Catholic Diocese of Great Falls, 224 Mont. 113, 118 (1986) (tort of bad faith in employment barred by the free exercise clauses of United States and

Montana Constitutions). See generally Annot., Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination, or Related Activity, 40 A.L.R. 4th 1062 (1985); Esbeck, Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations, 89 W.Va.L.Rev. 1 (1986). The judge's instructions in the present case, to disregard the requirements of the First Amendment regarding liability for intentionally tortious activity, were error.

The trial judge should have allowed the defendant's motion for judgment notwithstanding the verdicts on Mary's and Susan's claims of intentional infliction of emotional distress. Those claims could not stand in the absence of testimony regarding ISKCON N.E.'s religious beliefs. On retrial, damages alleged by Susan and

Mary based on allegations of intentional infliction of emotional distress may be considered to the extent that such damages are an element of the claims of physical and sexual abuse of Susan. Mary's claim of intentional interference with parental rights, discussed infra, also may be considered on retrial.[13]

3. Issues on retrial. We are constrained from answering definitively the defendant's arguments regarding the claims of breach of a duty of care and vicarious liability due to the difficulty in separating out consideration of the defendant's constitutionally protected religious beliefs from conditionally

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[13] We reverse the judgments against the defendant for the counts of vicarious liability for assault and battery and breach of a duty of care because, while the evidence regarding the defendant's religious beliefs admitted at trial did not bear directly on these issues, the possibility exists that the evidence may have infected the jury's consideration of these claims.

protected religious activity and from conduct outside the scope of constitutional scrutiny.[14] We remand those claims without further discussion. We address the defendant's contention that the tort of intentional interference with parental rights is not recognized in this Commonwealth, infra, and remand that claim for retrial as well.

"The common law has traditionally recognized a parent's interest in freedom from tortious conduct harming his relationship with his child," Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 512 (1980), and the parent "may be compensated therefor when there is interference with the normal parent-child relationship." Norman v. Massachusetts Bay Transp. Auth., 403 Mass, 303, 311

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[14] We note that the essence of the assault and battery claim is conduct by Doug Hewer, not religiously motivated and not entitled to constitutional protection.

(1988) (Liacos, J., dissenting on other grounds)[15] The tortious condcut referred to in Ferriter and Norman includes the abduction, enticement, and harboring and secreting of minor children from their parents, or in other words, the intentional interference with parent-al interests or rights. The elements of these causes of action are well established. Abduction is the physical taking of a minor child from the parent having legal custody. See Rice v. Nickerson, 9 Allen 478 (1864). An action for enticement will lie where one, through an "active and wrongful effort" and knowing that the parent does not consent, induces a child to leave the parent's home.

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[15] A natural parent may have what amounts to a liberty interest in the relationship between parent and child, and in controlling the child's education and upbringing, where the parent has committed herself to the personal, financial, and custodial responsibilities associated with raising the child. See Hodgson v. Minnesota, 110 S.Ct. 2926, 2942 (1990).

Butterfield v. Ashley, 6 Cush. 249, 250-251 (1850).[16] One "harbors" a minor child by inducing or encouraging a child, who is away from the parent without the parent's consent, to remain away from the parent. See Stowe v. Heywood, 7 Allen 118 (1863). Liability for harboring a child will not be found, however, unless the actor knows or has reason to know that child is away from the parent without the parent's consent. See W. Prosser & W. Keeton, Torts Section 124, at 925 (5th ed. 1984). Implicit in each action is the requirement that the child be physically absent from the home for a continuous period of time. To allow recovery for interference with parental interests without physical absence of the minor

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[16] A Missouri court had held that the actor must "knowingly and designedly decoy[]" the minor child from the home. Kipper v. Vokolek, 546 S.W.2d 521, 525 (Mo. Ct. App. 1977). Mere persuasion is not enough. See Meikle v. Van Biber, 745 S.W.2d 714, 716 (Mo. Ct. App. 1987).

child from the home would be to allow an action for alienation of affections, for which recovery cannot be had. See Ronan v. Briggs, 351 Mass. 700 (1966).[17]

The Restatement (Second) of Torts Section 700 (1977) encompasses all of the actions described above: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has [ ] left him, is subject to liability to the parent."[18] Jurisdictions recognizing the

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[17] The trial judge in the present case instructed the jury that liability may be found where an actor "compels or induces a minor child to leave or defy the authority of the parent legally entitled to its custody" (emphasis added). Induced defiance of parental authority, without physical absence of the minor child from the home, is not enough to establish liability under this tort.

[18] An action may not be maintained against a person who simply provides the child with shelter and sustenance. See Restatement (Second) of Torts Section 700

tort of intentional interference with parental rights as such define it in accord with Restatement (Second) of Torts Section 700, and the case law of those jurisdictions is consistent with the case law of this Commonwealth. See, e.g, Surina v. Lucey, 168 Cal. App. 3d 539 (1985) (interference with parental rights based on Section 700 for abduction and enticement); D & D Fuller CATV Const., Inc. v. Pace, 780 P.2d 520 (Colo. 1989) (recognizing tort of interference with parent-child relationship as set forth in Section 700); Plante v. Engel, 124 N.H. 213 (1983) (liability for aiding and abetting intentional interference with custodial parent's rights based on State

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comment a. Further, it is a defense that a person acts to rescue the child "from physical violence inflicted by the parent in excess of his parental privilege," or that a person is authorized by law and acts within the scope of that authority to remove a child from an improper home. Restatement (Second) of Torts Section 700 comment e (privileges to act).

constitution and Section 700). But see Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990) (in context of custody dispute, court refused to recognize tort as not in best interest of child). We therefore acknowledge the tort of intentional interference with the parent-child relationship as a contemporary expression encompassing actions for abduction, enticement, harboring, and secreting of a minor child from the parent having legal custody.

One crucial element of the tort of intentional interference with the parent-child relationship is the lack of parental consent to the child's absence from the home. A jury should consider, among other things, what actions and events led to the child's absence from the home, and what actions the parent took to return the child to the home, including the degree of effort or persistence

exerted by the parent in obtaining legal assistance. In addition, the jury should consider what actions, if any, the defendant may have taken to obtain the parent's consent, either in good faith, or through fraud or duress. Of course, if consent is obtained by fraud or duress, there is no consent.

The early interference actions permitted recovery for damages based primarily on the parent's loss of the child's services, although Stowe v. Heywood, supra at 122, recognized damages for loss of society as well, and was cited in Norman v. Massachusetts Bay Transp. Auth., supra at 307, as an early example of cases allowing recovery for loss of child's consortium due to the defendant's intentional acts. We have had no occasion to address these particular tort actions in light of the move away from the loss of services as the primary basis for recovery

for intentional acts which harm familial relations. See Diaz v. Eli Lilly & Co., 364 Mass. 153, 154-161 (1973) (tracing evolution of spousal claims from loss of services to loss of consortium).[19] This court has come to recognize, however, that the actual basis of recovery for intentional tortious acts which interfere with a parent-child relationship is the loss of filial consortium. See Ferriter v. Daniel O'Connell's Sons, supra at 510-512. In addition to compensation for loss of filial consortium and services, a parent may obtain damages for the cost of recovering the child, Rice v. Nickerson, supra at 481,[20] as well as for "mental

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[19] Damages incurred as a result of the loss of a child's services are recoverable, but they are not a necessary element of a cause of action. Restatement (Second) of Torts Section 700 comment d.

[20] Restatement (Second) of Torts Section 700 comment g indicates that reasonable expenses incurred in treatment of the child for illness or other bodily harm resulting from the defendant's

suffering" or emotional distress which results from the interference. Stowe v. Heywood, supra at 119, 122. See Restatement (Second) of Torts Section 700 comment g. See also Surina v. Lucey, supra at 544. But see Plante v. Engel, supra at 217 (intentional infliction of emotional distress treated as separate cause of action).[21]

4. Plaintiffs' cross-appeal. In light of our decision to vacate the jury's verdicts, it becomes necessary to address the plaintiffs' cross-appeal. The plaintiffs claim that: (1) the judge erred in instructing the jury that the defendant could not be held liable for the allegedly

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actions are also recoverable.

[21] We note that although the trial judge in the present case allowed separate claims of interference with parental rights and intentional infliction of emotional distress to go to the jury, the judge's instructions eliminated the element of emotional distress from the interference claim, avoiding the possibility of duplicative damages.

tortious activity of certain individuals and groups which occurred before ISKCON N.E.'s incorp-oration; (2) the judge improperly applied the applicable statute of limitations to Mary's claims; and (3) regardless of ISKCON N.E.'s connection to any indivi-dual or group engaged in allegedly tortious preincorporation activity, the defendant must be held liable for all of the damage suffered by the plaintiffs because their injury cannot be apportioned. We address each claim in turn.

a. ISKCON N.E.'s liability for preincorporation activity. As we have already noted, the defendant filed motions to dismiss the plaintiffs' original complaint which were referred to a special master on June 16, 1978. The special master issued a report which recommended, in part, that ISKCON N.E. not be held liable for claims arising prior to its

incorporation. On February 10, 1986, the defendant moved to adopt this section of the master's report. After hearing, the court allowed this motion on February 27, 1986.

On May 1, 1986, the plaintiffs moved to amend their complaint to charge ISKCON N.E. with liability for activity preceding its incorporation. The plaintiffs claimed that the defendant, in both its preincorporation and corporate form, had acted in concert with other practitioners of Krishna Consciousness to inflict tortious emotional injury on the plaintiffs. The judge denied the motion on August 7, 1986, based on his findings of undue delay on the part of the plaintiffs, undue prejudice to the defendant, and the legal futility of the plaintiffs' proposed amendment. The judge later allowed the plaintiffs to introduce evidence of preincorporation activity for

the limited purposes of providing background information for the jury and, if necessary, for assessing damages.

The decision to grant a motion to amend a complaint, while generally "freely given when justice so requires", Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974), lies within the broad discretion of a trial judge. Cappuccio v. Zoning Bd. of Appeals of Spencer, 398 Mass. 304, 314 (1986). This court has pre-viously noted that a judge who, as in the present case, denies a motion to amend due to undue delay or undue prejudice is acting within his discretion. Castel-lucci v. United States Fidelity & Guar. Co., 372 Mass. 288, 291-292 (1977). On appeal, the plaintiffs, who fail to mention that their motion was denied on grounds of undue delay and prejudice, provide us with no reason to believe that the judge abused his discretion. The plaintiffs have

limited their argument to the strength of their legal claim that the defendant should be held liable for allegedly tortious preincorporation activity. Even assuming that the plain-tiffs are correct in their claim that the defendant legally could be held respon-sible for the preincorporation activity, the judge acted well within his dis-cretion in denying the plaintiffs' motion on the grounds of undue delay and pre-judice. See Castellucci v. United States Fidelity & Guar. Co., supra at 291-292. The plaintiffs were not entitled to advance to the jury their claim that ISKCON N.E. is liable for the allegedly tortious preincorporation activity of others.

b. Statute of limitations. The judge ruled that the applicable statute of limitations prevented Mary from basing any part of her claims on allegedly tortious activity occurring before April 19, 1974.

In their brief to this court, the plaintiffs concede that if we rule against the plaintiffs on their ability to hold the defendant liable for pre-incorporation activity, Mary's statute of limitaticns claim becomes irrelevant because ISKCON N.E. did not become directly involved with Mary until after April 19, 1974. In light of our decision @in section 4(a) of this opinion, therefore, we need not consider the merits of the plaintiffs' statute of limitations argument.

c. Apportionment of plaintiffs' injury. At trial, the plaintiffs claimed that the tortious activity for which the defendant was found liable was a continuation of the tortious activity of other Krishna Consciousness practitioners which began prior to ISKCON N.E.'s incorporation. On appeal, the plaintiffs claim that the injuries they suffered were the indivisible product of both this

preincorporation activity and the defendant's postincorporation activity. The plaintiffs argue that, regardless of the defendant's connection to any pre-incorporation tortfeasors, ISKCON N.E. should be held liable for all the damages claimed by the plaintiff because the plaintiffs have suffered "one massive injury" which cannot be apportioned between preincorporation and post-incorporation activity. We disagree.

"Damages may be apportioned among two or more causes if there is a reasonable basis for doing so." Glicklich v. Spievack, 16 Mass.App.Ct., 488, 497 (1983). See Restatement (Second) of Torts Section 433A (1965) ("[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm"). The judge's decision

to apportion damages according to the date of the defendant's incorp-oration appears to us to have been eminently reasonable. Furthermore, contrary to the plaintiffs' assertions, the fact that the jury may have had some difficulty in calculating the exact extent of the intangible emotional harm caused by postincorporation, rather than preincorporation, activity does not render the plaintiffs' injuries indivisible. "There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant for the wound inflicted by the other." W. Prosser & W. Keeton, Torts Section 52, at 345 (5th ed. 1984). See Restatement (Second) of Torts Section 433A, at 435

("[t]here may be difficulty in the apportionment of some elements of damages, such as the pain and suffering resulting from the two wounds, or the medical expenses, but this does not mean that one defendant must be liable for the distinct harm inflicted by the other"). The limitation on the plaintiffs' recovery from the defendant was proper.

5. Conclusion. The plaintiffs' claims inherently are based, and were tried, by allowing the jury impermissibly to consider the propriety of constitutionally protected religious beliefs. On the counts of intentional infliction of emotional distress, the judgments are vacated and judgment is to enter for the defendant. The remaining claims are remanded for retrial consistent with this opinion.

So ordered.

MASSACHUSETTS STATUTES CITED IN PETITION

G.L. c. 265 Section 22:

Whoever ravishes and carnally knows a female by force and against her will shall be punished by imprisonment in the state prison for life or for any term of years.

G.L. c. 265 Section 22A:

Whoever ravishes and carnally knows a female child under sixteen by force and against her will shall be punished by imprisonment ...

G.L. c. 265 Section 23:

Whoever unlawfully and carnally knows and abuses a female child under sixteen years of age shall, for the first offense, be punished by imprisonment ....

G.L. c. 266 Section 34:

Whoever, with intent to defraud and by a false pretence, induces another to part with property of any kind ... shall be guilty of larceny.

G.L. c. 272 Section 1:

Whoever fraudulently and deceitfully entices or takes away an unmarried female under sixteen from her father's house or elsewhere, without the consent of the parent or guardian, if any, under whose care and custody she is living, for the purpose of effecting a clandestine marriage of such female without such consent, shall be punished by imprisonment ...

G.L. c. 272 Section 2:

Whoever fraudulently and deceitfully entices or takes away a woman or girl from her father's house or elsewhere, for the purpose of prostitution or for the purpose of unlawful sexual intercourse, and whoever aids an assists in such abduction for such purpose, shall be punished by imprisonment ...

G.L. c. 272 Section 6:

Whoever, being the owner of a place or having or assisting in the management or control thereof, induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse, shall be punished as provided in section 3.

SELECTED INSTRUCTIONS, CLOSINGS AND CHARGE RELATING TO FIRST AMENDMENT ISSUES

When, on direct examination, Susan Murphy testified, without objection by the Defendant, about how the devotees in the temple led her, at the age of 13 or 14, to question her previously held Catholic beliefs and called her mother a "demon" (TR 650 - 651) the Counsel for Plaintiffs asked Susan to describe the meaning, as explained to her by the devotees in the temple, of the word "demon." Defendant objected and the Court, after overruling the objection, instructed the jury as follows:

> I want to caution you, again. The belief of any religion is not an issue in this case. So the beliefs of a religion which were being related to this witness [Susan Murphy] are not before you for judgment.
>
> Persons are entitled to believe what they will in the practice of their religion. There is a constitutional protection permits them to believe without interference in this procedure or any procedure. TR 651 & 652

When questioned about what she had learned from the devotees in the Boston Temple in 1972 & 1973 concerning the different forms of human birth, Susan replied:

A. Well, they say that there are 8 million 400 thousand species of life and that a certain part of those 8 million 400 thousand species of life are human births. And the human, each species, well they consider different human births, like the body of a woman is considered to be a very low birth. The body of a black person is considered to be a very low birth.

Mr. Kelston: Objection, your Honor.

The Court: I will overrule your objection. But I want to emphasize, again. The person's belief and religious principles is personal and protected and the religion is protected. This is not on trial here: the question of belief. Again, this is only offered as background information for you to consider pertaining to the belief of any group or any person; particularly the beliefs of the members of this religion or of this religion itself. TR 671 & 672

When Susan was asked about the term "transcendental trickery" she answered:

A. It was used to describe the means by which you would obtain money from people. You could trick them if it was for the movement. Transcendental means that it's above the mode of material nature, so it

wasn't really trickery or deception because they were doing it for a higher spiritual goal.

Q. Now, was there an occasion in which you were - -

The Court: I have to repeat something else to this jury, again. The question of religious beliefs is not before you. You are not to question religious beliefs of other persons or other religions throughout this trial. If you have to address any aspects of religion, it might be the propriety of religions acts, as opposed to beliefs. TR 850

When Susan was questioned about the Hare Krishna teachings concerning the inferiority and inherent evil of women, the Court, after an objection by Defendant and a long bench conference on the admissibility of the evidence (946 et seq) instructed the jury as follows:

Mr. Foreman, and Ladies and Gentlemen of the jury, the line of inquiry, at the moment, touches upon the religious beliefs of Hare Krishna religion. The religious beliefs of this religion are not at issue. I emphasize that to you.

The line of inquiry is permitted only for the purpose of placing evidence before you which you can believe, disbelieve, consider, do what you would like to in your ultimate consideration of this case. It's being placed before you for you to

determine whether or not such information was brought to this witness' attention and how if at all it affected her or caused her to act, or not to act or other persons were caused to act in certain ways.

Again, when the Defendant's first witness was under cross examination and asked if he had been taught that women were less intelligent than men in his Srimad Bagavatam classes, the Court, after overruling an objection to the question charged the jury, sua sponte, that:

I want to caution the jury, again.

The question now being placed to this witness might be question about what was taught as a tenet of this religion, and those beliefs are not before you for question. If someone believes in a religion they are entitled to believe in it,, and the law may not interfere with that practice or belief. TR 2108

The Court was very active in protecting the rights of the Defendant in this regard sustaining objections to evidence, such as Exhibit 25, but finally letting it in after the Defendant presented evidence on the issue in its case. At times, sua sponte, without any

objection from the Defendant the Court, excluded evidence and issued limiting instructions, see e.g. TR 798 & 799. At other times the Court warned Defendant's counsel that their direct or cross examination would open areas that Plaintiffs could exploit. See TR 2119 and 3942 lines 21 & 22.

Defendant's closing dealt extensively with the religion of the Defendant.

What Susan was taught is not an issue in this case. As His Honor has expressed to you on a number of occasions The Several Cantos that were put into evidence that Susan testified the substance of those Cantos, the teachings of Krishna Consciousness are no an issue in this case. The issue is whether or not by reading those Susan had some impact on her emotional state. It is one of the points that this case rests on.

The other point that the case rests on is what she perceived to be the role of women. How she felt in the process of sankirtana. How she felt by the fact that certain readings were offered during the course of prayers following the sankirtana book sales collection.

In addition to the inferences you can draw from these sequence of facts, let me suggest to you, ladies and gentlemen, that there is also your own common experience

to be drawn into these events. You have to determine from your own experience, in whatever religious practices you participate, whether or not organizations that solicit funds, collect funds, commend people for their activity and their religious beliefs. That is whether or not they subscribe to magazines, or books. Whether or not they contribute chandeliers to religious institutions. Whether or not they participate in a gift shop that may be available in an institution to buy memorabilia or other items of religious significance and funds are raised for it.

Now, early on in the case, we asked Doctor Harvey Cox to speak to you, give you an opportunity to identify what Krishna Consciousness was in 1974, based on his long experience and education and a background as a theologian, representing five thousand years of history of Krishna Consciousness. We felt it was very important to bring that evidence to you in terms of, as we said, legitimate manifestations of how the particular religious practice, the altar, the deities, the chanting of beads, the wearing of clothes, describing the relationship of a practitioner to the religion, the white, the saffron dhoti. The clothes that the women wear. The markings that they use. The practice of sankirtana as a religious practice. And I think the testimony from Dr. Cox will present to you that those manifestations are consistent with many world-wide religions. Admittedly, practice or Krishna Consciousness today in this country is a minority religion. Some two or three million practitioners in India. Certainly wouldn't represent a minority opinion religion. But here it is. But that religion is entitled to all the

constitutional protection under our Constitution, which is being commemorated two hundred years, and the Bill of Rights, a hundred ninety-six years, as any other religion is.

Now if Susan was hungry, if Susan didn't get enough sleep, I would submit to you that is not constitutionally protected... TR 4075 - 4077

As I indicated to you in some of my preliminary comments, there is an overriding factor in this case and that is the question of religious practices. This is probable a unique case and we've all had the opportunity to participate in this past month. It's not often that there is brought before a jury the question of what a religion does, ow it does it, and then ask you to decide facts outside the religion. But it has been raised. It is a problem that we are concerned about in representing I.S.K. Con New England. We fully understand, I know His Honor has explained to you over and over that the question of the practices of the Krishna Consciousness dictates are clearly not an issue. It will be your responsibility to separate those practices from the events that took place throughout your deliberations and I fell confident that you will undertake that responsibility as you have in terms of everything else, listening to what we have had to say, listening to argument, throughout the course of your deliberations.... TR 4086 - 4087

It's my recollection Dr. Zinberg's conclusion in his report is that Susan wanted to change the movement for the women. Change things from the inside. You change things by becoming involved and

committed. You change religious organizations by becoming religious; not anti-religious. This lawsuit cannot change the religious practices of Krishna Consciousness. This lawsuit cannot change the religious teachings of five thousand years of Krishna Consciousness. This lawsuit can only attempt to compensate Susan. Her need and feelings according to Dr. Zinberg in 1986 was to change the religion.

We are not here defending I.S.K. Con New England on the basis that its religion should be changed. It's religious practices should be altered. We are here submitting to you the fact that we do not believe that I.S.K. Con New England is liable for monetary damages to Mary or Susan Murphy by reason of the short time frame experience in the practice of Krishna Consciousness in 1974 through 1975. Everything else is extraneous to the issues in this case.

I would submit to you, respectfully, that there is no liability or basis for damages.

You have been patient and consistent during our deliberations as advocates for our client's cause; and if there have been times I have had to interrupt, or associate counsel have interrupted to make objections, let me apologize for those indiscretions. We have side bar conferences to rule on matters of law and issues in this case and you have had to sit here patiently for fifteen and twenty minutes while the judge and counsel debate some of the evidence to go in, or some of the legal issued framed evidence and I thank you.

There is a further dimension I would like to submit to you in terms of your deliberation. That is your common knowledge and experience from whatever religious practices you have participated and whatever your experiences may be. I hope that you will find they are not dissimilar; the manifestations as represented by Dr. Cox that took place in 1974 and 1975 at the temple at 72 Commonwealth Avenue, or even for the short period of time 40 North Beacon Street, until they moved. TR 4096 - 4098

In Plaintiff's closing the first issue dealt with was religious freedom.

Mr. Frieden: Ladies and gentlemen, this case is not about religious freedom. The plaintiffs do not attack the legitimate religious practices of Krishna Consciousness, nor do we attack the teachings of Krishna Consciousness as those teachings are legitimately applied in the United States of America.

The plaintiffs object, and this will be a constant, has been a constant reprise through the trial, the Plaintiffs object to the application of those teachings to a fifteen and sixteen year old girl against the wishes of her mother.

The first exhibit in this case, Susan Murphy's birth certificate. That exhibit, I would submit, renders the Defendant's case inapplicable, because all of the claims of religious freedom relate, and I think the Judge will charge this, we hope the judge will charge this, to relations with adults, to legitimate religious practices. Not to practices vested upon a fourteen and fifteen year old girl. The

elements of Susan's age permeate this case.

Mr. Minkoff referred to Susan's free choice when Susan was thirteen and fourteen and fifteen and sixteen years old. When children should not be making those choices. And when Mary Murphy did what she could, and we will get to that a little later, when Mary Murphy did what she could to stop Susan from making the choices that Susan shouldn't be making. And when this defendant did everything it could to encourage Susan to make the choice in its way, in derogation of Susan's rights and Mary's rights, and to do great damage to them.... TR 4100 - 4102

Susan Murphy was a child of fourteen years old who had it in her mind to become a Hare Krishna devotee and to do everything that she could to become a Hare Krishna devotee; and they knew that and that invested them with a special relationship, special power over Susan. Because as you heard, in terms of the hierarchy, it goes from God through disciplic succession to the Bhaktivedanta Swami to his GBC, his governing body commission, and to the temple president. And Susan seeking to become a Hare Krishna devotee was bound by the tenets of the religion that she as a child wanted to accept' and the tenets of that religion gave to the president of this temple, this person Angus Murphy, or Adi Kesava, gave to him the power to govern her actions, and it gave to the other older devotees the power to advise her. If you remember, the testimony was that younger devotees would look to older devotees for guidance and certainly Larry DeGregory and Carol DeGregory and Traidasa were older devotees and they were officers in the temple.

What happened here is that this Defendant transmuted its special power over Susan Murphy, its special influence over Susan Murphy. And what did it do? Well, they first told her to stay in this relationship with Doug Hewer in which she was being abused. Then they told her to change. Now, the change was from one sort of control to another sort of control. Once she was in the temple, she was even more completely subject to that control.... TR 4102 - 4104

Now there are a number of facts about the conversation between Mary and Adi Kesava that came out on cross-examination that Mr. Minkoff didn't allude to at all. He didn't allude to the conversation where Mary imposes a condition that Adi Kesava get her into a school and he said, "I'll do the best I can." He said he'd do what he could. And he admitted on cross-examination, at deposition, and at trial, because oftentimes you can get someone to say something that is true that he really wouldn't normally want to say. Adi Kesava admitted that he had never told Mary Murphy about the collection activity, going out in the streets and begging under false pretenses. He never told Mary Murphy about the sleep situation. He never told Mary Murphy about the food situation. He never told Mary Murphy that he was going to teach her daughter from class, from text, from religious texts that are supposed to be the word of God that her brain was half the size of a man's and she was stupid. That she was nine times lustier than a man. That she should submit to any man. That she should be the servant, and I use the word in the basest form, of her husband. Did he tell her that? He didn't tell her that. He talked to her daughter and he said to her

daughter, "Your mother is a marshmallow. You can push her. You can get anything you want out of her.... TR 4107 - 4108

This is not a case of religious freedom. This is a case of an organization that has some religious components, admittedly. But an organization that is I would submit to you not used to working in lawful channels. That feels that it is above the law. They have polygamous marriages. They tell people to go and beg in illegal situations, falsify their circumstances of what the money is for. They take -- well, the circumstances of this case specifically with respect to Susan.... TR 4109

Now, you compare [Plaintiff's] witnesses with the witnesses for the defense. First of all, we have devotees People who have chosen, and maybe it was a rather courageous choice, a very different lifestyle than people on the jury, and myself, and defense. But the one thing that you have to understand about those people is that their lives, their physical well-being and their lives are governed at least in the supervisory sense by the Governing Body Commission. The Governing Body Commission is in this courtroom. Does that affect their credibility? That is a question that you have to answer.... 4111

Then the defendants have also testifying for them Doctor Daner. Again, we see the fine hand of the GBC. Doctor Daner needs their permission to go in and finish, do her second book, and she admitted that if she didn't have their permission she couldn't go into the Hare Krishna temple and do so her second book.

Remember Doctor Daner's demeanor on the stand. This is a woman who said to you she had been Susan and Mary's friend for years, and whenever she came to Boston she would come and see Susan and Mary. But remember she was so eager to make her point. But, she was so eager to testify for the Defendant in this case. After all, her highest professional achievement was writing the book. The next highest is going to be writing the next book. And I think that you should consider that when you think about the credibility of Doctor Daner's testimony.... TR 4115 - 4116

I think there, I submit that the evidence of the interference of this religion, of this Defendant for whatever reason, to gain an adherent, to gain an economic member of the community who can go out on a day and pull in a hundred-fifty bucks, for whatever reason, there was interference here.

Susan wasn't living at home. She was in the Boston area and she wasn't living at home.... TR 4116 - 4117

Now if someone was totally unrelated, and he used doctrines of religion to keep Susan Murphy away from her mother and separated, they are not responsible for that. But that is not what happened. Susan was going to the temple every day. She was giving them service. She was contributing money by going out and begging on the street. They had an interest and they cooperated with Hewer in that first period. Then, as Hewer saw, the girls in the temple started to work on Susan and take her away from him. By the same token, they took her away from Mary, as well, or kept her away.... TR 4118

One other point I want to point to and remind you of, the coercive techniques. The emotional isolation, lack of sleep, change in diet, personal degradation, the lack of privacy, all of these things that occurred in that temple.

I want to point to you and remind you of the photograph, if I can find it. Here it is. The Nrsimhadeva photograph that we saw or the painting that was on the altar, and that was prayed to many times a day. And then this exhibit by the defendant, the Prahald work book, which I found very interesting picture, because they feel it's not really, there was some dispute as to whether this photograph was on the altar, but if you look at the picture of Nrsimhadeva, here, it's not that much different, is it? And this is for kids. This is for twelve, thirteen, fourteen year old children. That is what they tell them is going to happen to their parents if they interfere with the Krishna Consciousness. And as the old saying goes, "There's blood all over the floor." It's on page 27.... TR 4123

Susan was subjected at an early age to destructive teachings, teachings that were destructive to her personality, to her psyche, and Doctors Zinberg and Norberg and Carroll testified to this, and she suffers from it today; and she's going to have to have four more years of psychiatric care, and I think the rate was eighty-eight hundred a year. But she's been subjected to it all through this time, all through these years.... TR 4125

You have here people who ask you for a verdict. We ask you only for justice. We ask you not to allow this organization to hide behind the great opinions that

have made his country such a wonderful place to live. There is freedom of religion here. Freedom of religion is not a license. It's not a license to do anything that you want. Not a license to take children from the home. not a license to lie and beg on the streets. It's not a license to do what these defendants did to Susan Murphy and Mary Murphy.... TR 4127

In its charge, after the closing arguments, the trial court instructed the Jury that:

Now, I brought to your attention on a number of occasions during the course of this presentation of evidence the constitutional protection afforded this defendant as a religious organization. I did that so you will completely understand throughout these proceedings that this trial is in no way a trial pertaining to a challenge of religious beliefs of the members of this organization, or of the organization, itself. I emphasize that as a result of the evidence you are not to question the religious beliefs of the devotees of Hare Krishna, or the corporation known as ISKCon of New England.

The Court then read from and explained the First and Fourteenth Amendments to the U.S. Constitution and Article 2 of the Massachusetts Declaration of Rights. It instructed the jury that

all parties agreed that Defendant was a religious corporation entitled to those protections.

Now there are two basic rules which you must keep in mind pertaining to religious freedom. One is the law of this jurisdiction prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization. Matters of belief then are absolutely beyond state judicial intervention and the right to believe is absolute.

The second basic understanding you must have is that it is equally beyond the reach of civil law when they do not involve religious doctrine, discipline, faith or internal organization.

It has been said by our courts, and this is the law, that though the freedom to believe is absolute, the freedom to act cannot be. Conduct remains subject to regulation when that conduct constitutes a clear and present danger to a substantial interest of the state or a menace to the public peace and order.

Quoting a recent federal case: "The law is a process of constant adjustment between conflicting rights for the common good. No asserted right can at all times and in all circumstances be superior to all others. And so it is with the First Amendment, despite its exalted place in our law. For example, freedom of speech and the press are placed in the same high category as the right to free exercise of religion and yet rights under the law of libel and slander are preeminent."

By way of another illustration, a very simple one, which I think you will grasp without any problem. Practitioners of a religion, for example, cannot seize and hold a wayward member of their religious group against that person's will for the person's refusal to continue as a practitioner of that religion. If they did not, that might be a false imprisonment or kidnapping and would not be tolerable in this society. That conduct would consist of a violation of a State right to prohibit such conduct and the personal right of the individual not to have his or her liberty interfered with. Such conduct could result in both criminal and civil liability for those members of the religious group offending the individual involved. In the situation that I just gave you, it is perfectly permissible for the member of that church group to disapprove of the action of their former associate but it is not permissible for them to act in violation of that person's freedom to exercise his or her right to practice or not to practice the religion. The interference with that person's liberty would be conduct on the part of the religious organization's members warranting either action by the state or by the individual, himself, or herself, to exercise rights to secure a remedy in the courts.

It is important that you understand the conduct of religious organizations and persons in the free exercise of their religion, while it may be subject to regulation, may also be appropriate and proper and legitimate conduct in every respect. The practice of a religion, of course, ordinarily involves conduct as well as belief and appropriate conduct in that practice of religion is protected

equally as religious belief when lawfully conducted.

For example, the regulation of diet, the intake of food, restriction in type of food is sometimes common practice in many religions.

The proselytizing of the religion, itself, is accepted and encouraged practice in most religions of the world. The worship at churches and temples, the use of altars, teachings from scriptures, the presence of holy scrolls, statues of holy figures are commonplace in western religions as well as eastern religions. Such uses are widespread, accepted and appropriately utilized in the conduct of the free exercise and free conduct of one's religion. Fund raising is not only permitted but parallels in many instances the practice in fund raising as described by the defendant corporation. Though aspects of that might well be in controversy.

Training and teaching of the young, the converts, and those who practice the religion throughout their life is common place, and the norm, as opposed to the exception in practically every religion you can think of.

You must look at the situation before you now to determine why then, if the defendant corporation is a religious corporation, and was practicing its religion and preaching it during the course of its relationship with Susan and Mary Murphy, why then are we here?

We are here because the plaintiffs, Mary Murphy and Susan Murphy, while they concede the defendant is a religion, they

allege that the defendant engaged in conduct constituting tortious actions or a breach of a duty the defendant owed to them which they assert is not protected under the First Amendment.

The Complaint alleges intentional torts and conduct by this defendant in its relations to Susan Murphy, a child, and Mary Murphy as the mother of that child. I'll explain to you, now, without passing in any respect on the merits of this case the torts involved in this case.

The tort of intentional infliction of emotional distress in not protected by the umbrella of the First Amendment. The tort of intentional interference with parental custody is not protected by the shield of the First Amendment. And a person assuming legal obligations pertaining to a child and its upbringing, supervision and custody, if in conflict with overriding state interest, and the welfare of that child, or of the rights of the child to certain protection and benefits, may also give rise to liability.

Supreme Court, U.S.
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No. 91-191

In The

Supreme Court of the United States

October Term, 1991

SUSAN MURPHY & MARY MURPHY,

Petitioners,

v.

I.S.K.CON. OF NEW ENGLAND, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Judicial Court of Massachusetts correctly held that a cause of action for intentional infliction of emotional distress may not, under the First Amendment, be predicated upon the content of a religious organization's core beliefs and teachings.

2. Whether the Supreme Judicial Court correctly held that the First Amendment requires appellate courts to independently review the record of a case and to reverse any cause of action which may, even in part, have been based upon constitutionally protected practices.

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STATEMENT OF THE CASE

1. Respondent, International Society for Krishna Consciousness of New England, Inc.,[1] is a religious corporation organized in February, 1974, for the purpose of propagating the Krishna Consciousness religion in the New England area. Appendix 87-89.[2] At the time of defendant's incorporation,[3] plaintiff Susan Murphy was living in Pittsburgh, Pennsylvania with her boyfriend, Doug Hewer. A 1161.[4] The two were associated with the Krishna temple located there.

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[1] For purposes of clarity, respondent will hereinafter be referred to as "defendant" or "ISKCON, N.E." Petitioners will be referred to as "plaintiffs".

[2] Appendix (hereinafter "A") refers to the Appendix filed in the Supreme Judicial Court. A Supplemental Appendix was also filed in the Supreme Judicial Court, which will hereinafter be referred to as "SA".

[3] In May, 1986, plaintiffs moved to amend their complaint to hold defendant liable for allegedly tortious activity preceding its incorporation. The motion was denied by the trial court on August 7, 1986, based upon a finding of undue delay by the plaintiffs, undue prejudice to the defendant, and the legal futility of the plaintiffs' proposed amendment. SA 40-52. The trial court's ruling was upheld by the Supreme Judicial Court. Pet. App. 56; 409 Mass. 842, 864, which is a state law matter not reviewable by the present proceedings. Accordingly, defendant's statement of the case is limited to the post-incorporation period, except where relevant to the current petition.

[4] Susan first met Doug, who had an off-again, on-again relationship with the religion, *e.g.*, A 2418-419, 2436-439, sometime in the summer of 1972. They became girl friend and boy friend that Fall.

In July or August, 1974, Susan and Doug returned to the Boston area to assist Susan's mother, Mary, with a legal problem unrelated to the present case. A 764. At this time, they lived in a rented apartment in Brookline, A 764, and began visiting and participating in the activities of ISKCON N. E.'s temple located in Boston. A 765-67.

After about one month, Susan and Doug moved into the private apartment of Traidas and Pranada, two members of the Boston temple. Susan testified that Traidas was president of the temple at this time. A 807. While living with Traidas she continued to visit the temple and participate in its spiritual programs. She woke up at about 3:00 a.m. to attend early morning worship services, ate breakfast at the temple, and then would return home, coming back to the temple later for various activities, including sewing, making flower garlands, and cleaning. She also attended evening classes on defendant's scriptures. A 807-08.

Susan turned sixteen on August 14, 1974. A 766.

Around September, 1974, Susan and Doug moved into the private apartment of Carol and Larry De Gregory, two other members of the Boston temple. A 809. Susan testified that Larry was the temple's treasurer. A 812. In November, 1974, after moving to another apartment which they were unable to afford, A 1242, the two couples requested permission from ISKCON, N.E.'s president, Adi Kesava, to move into the Boston temple facility. A 814-15, 1242-243.

Adi Kesava told Susan that she could live in the temple if she first obtained her mother's permission, and on the condition that she follow the religion's practices of

a vegetarian diet, no illicit sex, no intoxication, no gambling, and regular attendance at the temple programs. Susan agreed to these conditions and arranged for Adi Kesava to speak to Mary, who, on certain conditions, consented to Susan living in the temple. A 3481-482.

After moving into the temple, Susan and Doug lived separately. A 1243-244, 3969. Apparently unhappy with this arrangement, Doug left the temple a short time later. A 3516-517. Susan, however, remained, and willingly participated in regular chores, rituals, and classes associated with the temple and the practices of Krishna Consciousness. A 1240, 1278-280, 1359, 3861-862.

In December, 1974, or January, 1975, Mary asked Susan to sleep at home on weekends. Susan agreed, but continued to spend most of her time at the temple. A 932-33. Shortly after Susan was formally "initiated" into the religion in January or February, 1975, she began spending every night at her mother's house, although she continued to spend her days at the temple. A 1184, 1187.

In April, 1975, Mary found a letter written by Susan to a friend which alluded to a "plan" by several members of the Boston temple to send Susan to West Germany without Mary's knowledge or consent. Mary summoned Weymouth police officer Henry Vanesse, who informed Susan that she risked legal action if she attempted to run away. Mary also demanded that Susan sever all ties with the defendant's temple. Reluctantly, Susan agreed. A 1461-473, 3008-013.

2. On April 19, 1977, Susan and Mary filed a complaint in the Superior Court alleging nine counts of tortious activity against (1) ISKCON, N.E., (2) a separate

Krishna corporation domiciled in California, and (3) His Divine Grace A. C. Bhaktivedanta Swami Prabhupada, the founder of Krishna Consciousness in the United States. A 29-30. Following extensive pre-trial proceedings in which the California corporation and Swami Prabhupada were dismissed, the case proceeded to trial on May 11, 1987, against ISKCON, N.E. on the following counts: (1) Susan's claim of intentional infliction of emotional distress; (2) Mary's claim of intentional infliction of emotional distress; (3) Susan's claim of intentional interference with the Murphy family structure; (4) Mary's claim of intentional interference with her parental rights; (5) Susan's claim that ISKCON, N.E. breached its duty to adequately provide for her welfare while she was under its care; and (6) Susan's claim that ISKCON, N.E. aided and abetted Doug Hewer in committing assault and battery on her by way of nonconsensual sexual intercourse.

At trial, evidence was presented which, the plaintiffs claimed, established that Susan's experience with the defendant caused her to suffer "post-traumatic stress disorder," a low sense of self-esteem, and an inability to maintain a healthy relationship with men. Additional evidence showed that Susan remained angry with her mother for several months following her departure from the temple, A 1083, and that Susan expressed a desire to return to her chosen religion. Susan and Mary's relationship began to improve when, after about six months, Susan decided that she no longer wanted to be a member of the religion or visit the temple. A 1081.

On June 16, 1987, the jury found for the plaintiffs on four causes of action.[5] It awarded Susan $210,000 for the intentional infliction of emotional distress, and $30,000 for ISKCON, N.E.'s failure to provide for her welfare ($10,000 of which was attributable to defendant's failure to protect her from assault and battery by third persons). Mary received $350,000 for the intentional infliction of emotional distress, and $20,000 for the intentional interference with her parental rights. A 4261-263. The total award of $610,000 was more than doubled because of statutory interest from 1977. A 4315.

3. On appeal, defendant challenged each aspect of the verdict against it under the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. Defendant also employed a broad-based attack on the entire proceeding under the First Amendment, asserting that the nebulous nature of the claims, the inflammatory character of the evidence submitted in support of those claims, and the intensive and hostile scrutiny of Krishna religious beliefs and practices invited the jury to punish defendant for its unconventional and unpopular religious beliefs.

The Supreme Judicial Court (SJC), sitting en banc, vacated the judgments against the defendant for the claims of intentional infliction of emotional distress, and ordered entry of judgment for the defendant on those counts. Pet. App. 5, 409 Mass. at 844. The SJC found that

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[5] Susan's claim for intentional interference with her family structure was dismissed in connection with defendant's motion for a directed verdict. A 4051-054.

those claims were impermissibly predicated on the content of defendant's religious beliefs and teachings, in that plaintiffs were permitted to extensively suggest to the jury that "exposure to the defendant's religious beliefs was sufficient to cause tortious emotional damage and to separate Susan from her mother." Pet. App. 29-30, 409 Mass. at 853-54. This, the SJC concluded, forced the defendant "to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and paying for damages for the privilege of maintaining unpopular religious beliefs" Pet. App. 32-33; 409 Mass. at 855, a result precluded by the First Amendment.

Because of the difficulty in segregating defendant's "constitutionally protected religious beliefs from conditionally protected religious activity and from conduct outside the scope of constitutional scrutiny" Pet. App. 43-44, 409 Mass. at 859, the SJC, without further discussion , remanded for retrial plaintiffs' remaining claims for intentional interference with parental rights, breach of duty of care, and vicarious liability for assault and battery.

REASONS FOR DENYING THE WRIT

Plaintiff, Susan Murphy, a former adherent of the Krishna Consciousness religion, sued the temple where she lived for a brief period of time, claiming that the religious beliefs which she learned from defendant's scriptures and other devotees living in the temple caused her severe emotional distress. Her mother, plaintiff Mary

Murphy, also sued the temple, claiming that she too suffered emotional distress because of her daughter's conversion and adherence to a religion of which she came to disapprove.

The trial lasted six weeks. During that time, plaintiffs presented extensive evidence of ISKCON, N.E.'s religious beliefs and practices, which the jury ultimately found wrongful. These beliefs and practices included reincarnation, *karma*, detachment from the material world, the role of women in the religion, vegetarianism, and chanting the names of God.[6]

The SJC steadfastly refused to be drawn into the theological thicket created by plaintiffs at trial. Characterizing the lower court proceedings as a "heresy trial," the SJC emphasized that the issues raised by plaintiffs regarding defendant's religious beliefs and practices have "no place in the courts of this Commonwealth." A 32, 409 Mass. at 855.

For the reasons discussed below, this Court should also decline plaintiffs' invitation to become embroiled in a controversy over the propriety and impact of religious beliefs, which are more appropriately the subject of a "theological or academic debate" *id.* than adjudication in a secular court of law.

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[6] Hare Krishna, Hare Krishna, Krishna Krishna, Hare Hare/ Hare Rama, Hare Rama, Rama Rama, Hare Hare.

I. TORT LIABILITY FOR EMOTIONAL DISTRESS MAY NOT BE PREDICTED UPON THE CONTENT OF RELIGIOUS BELIEFS.

It is undisputed that plaintiffs' two primary causes of action for intentional infliction of emotional distress are premised exclusively on ISKCON, N.E.'s religious beliefs.[7] At trial, Susan testified that prior to her involvement with ISKCON, N.E., she learned "from the devotees" that the position of women in the Hare Krishna religion is subservient to men. A 672. Then, as the centerpiece of her testimony, she spent over half a day on the witness stand reading passages from the *Srimad Bhagavatam*, one of ISKCON, N.E.'s primary scriptures, A 2156-157, concerning the roles of men and women in the Krishna religion.[8] Specifically, Susan selected 50-60 verses

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[7] Plaintiffs acknowledge that ISKCON, N.E.'s religious beliefs were "exceedingly relevant to the issues in the case. The defendant's teachings were one of the means by which defendant committed its tortious conduct." Pet. Br. at 47.

[8] Plaintiffs represented before trial that ISKCON, N.E.'s religious beliefs would not form the basis of liability. SA 2. Immediately prior to the presentation of plaintiffs' evidence, however, it became apparent that defendant's religious beliefs would form the centerpiece of plaintiffs' case. Accordingly, defendant filed a motion *in limine* to exclude "passages from the scriptures . . . religious pictures of various sorts . . . sermons . . . " A 495. In response, plaintiffs sought the admission of "scriptural teaching concerning sub[jugation] of women." A 497. While the trial court initially took a "dim view of admitting such evidence," *id.*, it subsequently denied defendant's motion to exclude "evidence regarding the teaching of Krishna religion, concerning the respective roles of men and women." A 664-65; *see also* A 94, 495, 946-56.

out of 1200 which she had studied, and presented 20 directly to the jury. A 1230. This testimony took the form of Susan being shown specific scriptural passages by her attorney, and then being asked if she could "recall being taught that text at the defendant's temple in Boston in 1974 and 1975." *E.g.*, A 995. If she answered affirmatively, she would then read or describe the particular portion of the text, and would discuss anything else she was "taught . . . supplementing in addition to the exact words that [she] just read with respect to this verse." A 997. Plaintiffs' expert, Dr. Zinberg, in turn, later testified that Susan's psychological reaction to these teachings caused her to lose self esteem and suffer emotional distress. A 2800-802. The theme established by reading from the scriptures was then argued to the jury as the primary predicate for liability and damages. A 4101.

In a similar vein, Mary Murphy's cause of action for intentional infliction of emotional distress is based upon her unhappiness over Susan's conversion to and practice of Krishna Consciousness. Thus, Mary testified at trial that her emotional distress began with Susan's initial contact with Krishna consciousness in 1972, A 2817, and continued years later while Susan was living part-time at home. A 2823. Even during the six to eight weeks after Susan completely severed her relationship with ISKCON, N.E. in 1975, Mary was emotionally disturbed over Susan's "chanting, wearing beads, [and] announcing her commitment to Krishna consciousness." A 2826. Dr. Zinberg then testified that the cause of Mary's emotional distress from the early 1970s through the 1980s was her fear that Susan might return to Krishna Consciousness, A 2825-832, which he reiterated as part of his prognosis for Mary. A 2844.

Both of plaintiffs' causes of action for intentional infliction of emotional distress, therefore, are squarely premised on the content of ISKCON, N.E.'s religious beliefs. The First Amendment, however, prohibits all "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). The government may not compel affirmation of religious belief, *see Torasco v. Watkins*, 367 U.S. 488 (1961), impose special disabilities on the basis of religious views or status, *e.g., McDaniel v. Paty*, 435 U.S. 618 (1978), take sides in controversies over religious authority, dogma, or theory, *e.g., Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Zorach v. Clausen*, 343 U.S. 306 (1958), or become involved in issues requiring secular courts to become "arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

Nor may the government punish the expression of religious doctrines it believes to be false, unhealthy, or coercive. *United States v. Ballard*, 322 U.S. 78 (1943); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men . . . . It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our constitution." *Ballard*, 322 U.S. at 86.[9]

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[9] As noted by the SJC, A 37, n. 11, 409 Mass. at 857, n. 11, this is particularly true when the expression of religious beliefs

(Continued on following page)

Religious adherents, therefore, may not be required to show that their beliefs are conventional or socially acceptable, *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972), or that they adopted those beliefs by a process that is "acceptable, logical, consistent, or comprehensible to others." *Thomas*, 450 U.S. at 714.

Yet, as noted by the SJC, the trial court required "the defendant . . . to do what the First Amendment has forbidden; it has been forced to attempt to prove to a jury that the substance of its religious beliefs is worthy of respect. " A 32, 409 Mass. at 854.

For this reason, the SJC was constitutionally justified in reversing the judgments for intentional infliction of emotional distress.

II. LIABILITY FOR TORTIOUS CONDUCT MAY NOT BE IMPOSED IF THE DEFINITION OF THE TORT GIVEN TO THE JURY ENCOMPASSES CONSTITUTIONALLY PROTECTED AS WELL AS UNPROTECTED CONDUCT.

As shown above, most of the evidence presented to the jury concerned protected religious beliefs, practices,

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occurs as part of a regularly scheduled program in the confines of defendant's place of worship. "[It is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

and activities.[10] On this basis, the SJC correctly recognized that it had a constitutional "duty to conduct an independent review of the record of the trial below" A 19, 409 Mass. at 849; *see Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (appellate courts have obligation to make independent examination of the record to ensure that judgment does not intrude on First Amendment rights), and to reverse any cause of action which may have rested, even in part, on constitutionally protected grounds. *Id.* at 20, 409 Mass. at 850; *see Founding Church of Scientology v. United States*, 409 F.2d 1146, 1164 (D.C. Cir.) (opinion on rehearing), *cert. denied*, 396 U.S. 963 (1969).

It is well established that neither criminal nor civil liability may be imposed on the basis of conduct that includes constitutionally protected speech. *E.g., Street v. New York*, 394 U.S. 476, 485-90 (1969); *Stromberg v. California*, 283 U.S. 359 (1931). In *NAACP v. Claiborne Hardware Co.*, for example, the evidence showed that participants in an NAACP-led boycott of commercial businesses in

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[10] During trial, defendant vigorously objected to the admissibility of passages from its sacred scriptures and, in general, to evidence concerning the role of women in the religion. A 94, 495, 664-65, 946-56. The court overruled these objections, holding the passages relevant to prove Susan's emotional distress: "If she would like to testify as to certain passages that were taught to her . . . and which will later be testified to [by the expert] as bearing upon emotional distress . . . or psychological damage, then they are admissible as being relevant." A 963. The court also held the religious scriptures admissible as relevant to Mary's claim of interference with her custodial rights, on the theory that defendant would be liable if it offered Susan religious instruction disapproved of by her mother. A 950, 952-53.

Claiborne County, Mississippi, had committed acts of violence that fell outside the protection of the First Amendment. 458 U. S. at 916. This Court held, however, that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability." *Id.* at 916-17. It reversed the damages against the NAACP and its co-defendants in their entirety, finding that the pleadings, arguments of counsel, and jury instructions had not adequately defined which elements of the alleged injury were "proximately caused by unlawful conduct" and which resulted from constitutionally protected activity. *Id.* at 917-18. The same principle, as extended to religious conduct and beliefs, supports the SJC's decision to reverse plaintiffs' claims for intentional infliction of emotional distress, and to remand the remaining claims for a retrial.

Indeed, defendant repeatedly argued to the trial court that because of its unpopularity in the community, *see, e.g.*, A 77-80, 101-03, 232, there was a danger that the jury could find liability solely on the basis of its religious beliefs and actions. *E.g.*, A 98-99, 106-07, 108-09. The trial court, however, disregarded defendant's fears, and rejected its request at the end of trial that the court identify for the jury in its instructions those facts which could properly form the basis of liability. A 4052-054. Instead, the court gave a generalized instruction to the jury that invited it to arbitrarily pick and choose among defendant's beliefs, practices, and actions in imposing liability for practices which the jury subjectively considered wrongful. A 4177-184. For this reason, the SJC aptly noted that the trial court "exacerbated the problem by erroneously instructing the jury regarding the extent of

the free exercise protections afforded by the First Amendment." A 37-38, 409 Mass. at 857.

The SJC was thus correct in conducting an independent review of the record and in reversing and remanding those claims which were based in whole or part upon constitutionally protected beliefs and practices.

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

August 30, 1991

Respectfully submitted

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